

PERFORMANCE ROYALTY

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-FOURTH CONGRESS

FIRST SESSION
Pursuant to S. Res. 72
on
S. 1111

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PERFORMANCE ROYALTY

THURSDAY, JULY 24, 1975

U.S. SENATE,
SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND
COPYRIGHTS OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 1114, Dirksen Senate Office Building, Senator John L. McClellan, presiding.

Also present: Thomas C. Brennan, chief counsel; Edd N. Williams, Jr., assistant counsel and Dennis Unkovic, assistant counsel.

Senator McCLELLAN. The subcommittee will come to order. The Chair will observe that Senator Hugh Scott was scheduled to preside at these hearings this morning. As he has been delayed, I am pinch-hitting for him until he arrives. At the request of Senator Scott, I am inserting at this point in the record a copy of the remarks that he had intended to make on S. 1111, at the opening of these hearings.

[The statement referred to is as follows:]

OPENING STATEMENT BY U.S. SENATOR HUGH SCOTT, BEFORE THE SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SENATE JUDICIARY COMMITTEE

Senator Scott. Today we are holding hearings on a matter of great importance and interest to all of us. We will consider whether artists—musicians, vocalists and narrators—should be compensated when recordings of their work are played publicly. We are considering S. 1111, an amendment to the 1909 Copyright Act. Under this bill, those who use sound recordings for profit would be required to pay a performance royalty to those persons whose talents are used in recordings. Present copyright law provides for royalty payments to the composers and publishers of creative pieces. S. 1111 would establish royalties for the performers. It would require payment by broadcasters, jukebox operators, background music services, and others who use recorded music for profit.

I have supported this extension of the performance royalty concept for the past 30 years. This matter has always seemed to me to be one of simple justice. But there are some who believe that since it was not originally established under the 1909 Copyright Act it should not be acted upon today.

The broadcasting industry has been a major opponent. Its major argument is that radio and television stations give free publicity

to the artists and the record companies. The issue, as I see it, is whether or not a person who uses his creative talents to produce music should be entitled to compensation from someone who takes the music and makes a profit from it.

The hearings I chair today will seek to examine all aspects of the performance royalty. Both opponents and proponents of the issue have been asked to appear and state their views. I am hopeful that when the hearings are concluded, the record will demonstrate as clearly as possible all aspects of the performance royalty issue.

Senator McCLELLAN. The Chair will now recognize the counsel for the committee, Mr. Brennan.

Mr. BRENNAN. Mr. Chairman, I request that there be inserted at this point in the record the notice of this hearing as it appeared in the Congressional Record on June 26, 1975, and the text of S. 1111, a bill to amend the Copyright Act of 1909 to provide for the establishment of a performance right in sound recordings.

Senator McCLELLAN. The notice of the hearing and a copy of S. 1111, the bill under consideration, will be printed in the record at this point.

[The notice of the hearing and a copy of the bill, S. 1111, follow:]

[Congressional Record, Senate, June 26, 1975]

NOTICE OF HEARING BY SUBCOMMITTEE ON PATENTS, TRADEMARKS AND COPYRIGHTS

Mr. McCLELLAN. Mr. President, as chairman of the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, I wish to announce that the subcommittee has scheduled a public hearing on S. 1111 to amend the Copyright Act of 1909 to establish a performance right in sound recordings. This hearing will be held July 24, commencing at 9:30 a.m. in room 1114, Dirksen Senate Office Building.

The subcommittee has previously held hearings on the subject matter of S. 1111. The subcommittee will allocate equal time to the proponents and opponents of the performance royalty amendment. Anyone desiring additional information should contact the staff of the subcommittee, telephone 224-2268.

[S. 1111, 94th Cong., 1st Sess.]

A BILL To amend the Copyright Act of 1909, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Performance Rights Amendment of 1975".

SEC. 2. The first section of title 17, United States Code, is amended—

(1) by striking out "and" where it appears at the end of subsections (c) and (d);

(2) by striking out the period at the end of subsection (e) and inserting in lieu thereof a semicolon and "and";

(3) by striking out subsection (f) and inserting in lieu thereof the following:

"(f)(1) To perform publicly for profit and to reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, any reproduction of a copyrighted work which is a sound recording: *Provided*, That the exclusive rights of the owner of a copyright in a sound recording to reproduce and perform it are limited to the rights to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording, and to perform those actual sounds: *Provided further*, That these rights do not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to the performance of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by broadcasting organizations exclusively for their own use.

"(2) Where the copyrighted sound recording has been distributed to the public under the authority of the copyright owner, the public performance of the sound recording shall be subject to compulsory licensing in accordance with the provisions of section 33 of this title."; and

(4) by inserting immediately before the period at the end of the last sentence of such section (relating to coin-operated machines) a comma and the following: "except that the provisions of this sentence shall not apply to the public performance of a sound recording under subsection (f) of this section".

SEC. 3. (a) Chapter 1 of title 17, United States Code, is amended by adding at the end thereof the following new section:

"§ 33. COMPULSORY LICENSING; ROYALTIES

"(a) The annual royalty fees for the compulsory license provided for in section 1(f)(2) of this title may, at the user's option, be computed on either a blanket or a prorated basis. Although a negotiated license may be substituted for the compulsory license prescribed by this subsection, in no case shall the negotiated rate amount to less than the following applicable rate or payment:

"(1) For a radio broadcast station licensed by the Federal Communications Commission, the royalty rate or payment shall be as follows:

"(A) in the case of a broadcast station with gross receipts from its advertising sponsors of more than \$25,000 but less than \$100,000 a year, the yearly performance royalty payment shall be \$250; or

"(B) in the case of a broadcast station with gross receipts from its advertising sponsors of more than \$100,000 but less than \$200,000 a year, the yearly performance royalty payment shall be \$750; or

"(C) in the case of a broadcast station with gross receipts from its advertising sponsors of more than \$200,000 a year, the yearly blanket rate shall be 1 per centum of the net receipts from the advertising sponsors during the applicable period, and the alternative prorated rate is a fraction of 1 per centum of such net receipts, taking into account the amount of the station's commercial time devoted to playing copyrighted sound recordings.

"(2) For a television broadcast station licensed by the Federal Communications Commission, the royalty rate or payment shall be as follows:

"(A) in the case of a broadcast station with gross receipts from its advertising sponsors of more than \$1,000,000 but less than \$4,000,000 a year, the yearly performance royalty payment shall be \$750; or

"(B) in the case of a broadcast station with gross receipts from its advertising sponsors of more than \$4,000,000 a year, the yearly performance royalty payment shall be \$1,500.

"(3) For background music services and other transmitters of performances of sound recordings, the yearly blanket rate is 2 per centum of the gross receipts from subscribers or others who pay to receive the transmission during the applicable period, and the alternative prorated rate is a fraction of 2 per centum of such gross receipts, taking into account the proportion of time devoted to musical performances by the transmitter during the applicable period.

"(4) For an operator of coin-operated phonorecord players, the yearly performance royalty payment shall be \$1 for each phonorecord player.

"(5) For all other users not otherwise exempted, the blanket rate is \$25 per year for each location at which copyrighted sound recordings are performed, and the alternative prorated rate shall be based on the number of separate performances of such works during the year and shall not exceed \$5 per day of use.

"(6) No royalty fees need be paid for a compulsory license for the public performance of copyrighted sound recordings by a radio broadcast station where its annual gross receipts from advertising sponsors were less than \$25,000, by a television broadcast station where its annual gross receipts from advertising sponsors were less than \$1,000,000, or by a background music service or other transmitter of performances of sound recordings where its annual gross receipts from subscribers or others who pay to receive the transmission were less than \$10,000.

"(b) The annual royalty fees provided in subsection (a) shall be applicable until such time as the royalty rate is agreed upon by negotiation between the copyright owner and the licensee, or their designated representatives: *Provided*, That the

annual royalty fees provided for in subsection (a) shall be applicable for a period of not less than two years following the date of enactment of the Performance Rights Amendment of 1975. In the event that the parties or their representatives are unable to agree upon a royalty rate pursuant to negotiation, the public performance of the sound recording shall be subject to compulsory licensing at a royalty rate and under terms which shall be set by an arbitration panel composed of three members of the American Arbitration Association, of which one member of the panel shall be selected separately by each of the parties in disagreement, and one member shall be selected jointly by the parties in disagreement.

"(c) The royalty fees collected pursuant to this section shall be divided equally between the performers of the sound recording and the copyright owners of the sound recording. Neither a performer nor a copyright owner may assign his right to the royalties provided for in this section to the copyright owner or performer of the sound recording, respectively.

"(d) As used in this section, the term—

"(1) 'performers' means musicians, singers, conductors, actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording; and

"(2) 'net receipts from advertising sponsors' means gross receipts from advertising sponsors less any commissions paid by a broadcast station to advertising agencies."

(b) The analysis of such chapter is amended by adding at the end thereof the following new item;

"33. Compulsory licensing; royalties."

Mr. BRENNAN. Mr. Chairman, the first witness is Miss Nancy Hanks, chairman of the National Endowment for the Arts.

Senator McCLELLAN. We welcome you this morning, Miss Hanks, and your counsel will be helpful to us. You may proceed.

STATEMENT OF NANCY HANKS, CHAIRMAN, NATIONAL ENDOWMENT FOR THE ARTS, ACCOMPANIED BY ROBERT WADE, GENERAL COUNSEL, NATIONAL ENDOWMENT FOR THE ARTS

Miss HANKS. Thank you very much. I know Senator Scott's interest in the legislation but I wish the point out to you as well that there are many artists in your State who will be grateful for the consideration of this committee to this legislation.

There are many fine artists, particularly in the folk area in Arkansas keenly interested in the legislation.

Senator McCLELLAN. Would you mind pulling the mike up closer to you?

Miss HANKS. I will yell.

Senator McCLELLAN. It is all right.

Miss HANKS. It is a pleasure to be here this morning to provide you with the views of the National Endowment for the Arts on S. 1111, a bill to establish a performance royalty in sound recordings for performing artists and record producers.

Mr. Chairman, the National Foundation on the Arts and the Humanities Act of 1965, as amended, the law creating the National Endowment for the Arts, contains an eloquent declaration of purpose. In that declaration, the Congress states—among other things—that:

* * * It is necessary and appropriate for the Federal Government to help create and sustain not only a climate of encouraging freedom of thought, imagination and inquiry, but also the material conditions facilitating the release of this creative talent.

I believe that this amendment to the Copyright Act of 1909, if enacted, would go a long way in correcting the present inequitable

situation with regard to the commercial exploitation of the creative efforts of performing artists and record producers.

I am, of course, speaking of the commercial use of the talent and the skills of performing artists and record companies whose creative efforts bring to life and preserve in sound recordings a song, a sonata, or a symphony.

The primary users of these recordings; that is, the radio and television broadcasters, jukebox owners, background music companies, et al., as we all know, utilize these creative products to their commercial benefit every minute of every day, and it goes without saying that without the creative efforts of performers and recordmakers, these industries would not exist as we know them today.

Mr. Chairman, this bill has been the subject of a great deal of discussion over the past few years. The Congress has been well informed as to the merits of this bill, and as well, has heard some voices in opposition. As you know, the National Endowment and the administration have joined those who support this proposed legislation.

Rather than go through all of the numerous arguments that have been set forth in support of this bill, and with which we are in agreement, I would prefer to enumerate here some of those that seem most persuasive to the National Endowment for the Arts.

1. The Congress, the courts, and the Copyright Office have all recognized that sound recordings are a proper subject for copyright protection under the Constitution and laws of the United States. As you know, the sound recording amendment of 1971 provided for sound recording copyright protection against the unethical record piracy. Litigation subsequent to enactment of the sound recording amendment has resulted in judicial affirmation of the constitutionality of antipiracy copyright protection for sound recordings.

2. Composers, songwriters, and publishers, all of whom similarly enjoy copyright protection under our laws, receive performance royalties.

3. Thirty-seven nations around the world now recognize by law performance rights for performers, or recordmakers, or both, including the United Kingdom, West Germany, Japan, Italy, Sweden, Mexico, Spain, and Israel, to name but a few. An International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in 1961. This convention, known as the Rome Convention, stated in article 12:

If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram or to both.

So far the convention has been ratified by 15 countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden.

4. No undue hardship would be imposed on those industries affected, since the relatively small—in terms of advertising and user revenue—additional costs of performance royalties probably would be passed on to the ultimate economic beneficiaries of the commercial use of sound recordings, that is, advertisers, jukebox users, background music users, and others. Further, it is my understanding that studies have shown that increased costs to the advertisers and other commercial users of sound recordings would be minimal.

Mr. Chairman, I understand that details of implementation have yet to be completely worked out by the various groups involved in the support of this legislation. While most such details are not a proper subject for concern for the National Endowment for the Arts, I would like to make one or two observations in this regard.

First, it is my understanding that the field—the record industry and the performing artists' union—is in agreement with the principle that all performers on a given record would share equally in the distribution of royalties derived therefrom. That is, there would be an equal distribution of fees between a solo performer and his or her supporting musicians. I heartily endorse that principle.

Second, Mr. Chairman, we would favor an implementation approach which would insure substantial benefits to performing artists involved in the creation of artistic works falling outside the commercially successful category, that is, the category of popular hits.

In other words, the National Endowment for the Arts would favor a distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involved in the creation of artistic works which are worthy in themselves but which by their nature do not have, at this time at least, the ability to generate mass sales.

Mr. McClellan, as you know, the National Endowment for the Arts when it was established by law in 1965, the Congress wrote a very eloquent declaration of purpose. That included the encouragement of artists and also the encouragement of the material conditions facilitating the release of creative talent.

It is interesting that we should be having trouble with our recording equipment. This is particularly important in view of the severe economic strain presently being felt by symphony orchestras, opera companies, and nonprofit arts groups across the country.

I might add that there has been a general concern in the country about the lack of recordings in symphonic, operatic, and folk music. We believe that this bill could serve to encourage the record companies to this direction. And further that the opportunity to receive performance royalties will encourage musicians through their respective associations to seek ways in which there can be more recording in these art forms in the United States.

Finally, Mr. Chairman, I am most pleased to be able to report to you our understanding that the recording industry would be agreeable to a provision in this legislation which would allocate a certain percentage of the royalties it receives as a result thereof to the National Endowment for the Arts, to be used for purposes consistent with the Endowment's enabling legislation.

[At this point Senator Scott entered the hearing room.]

The industry's attitude in this regard is most encouraging. This could have significant benefits for the Endowment's programs, being used for example, for the support of classical, folk, narrative, or other noncommercial recording projects. Or perhaps for providing advance training opportunities for musicians wishing to further their careers.

In conclusion, Mr. Chairman, I heartily endorse the view that artists, musicians, and record companies who contribute their creative efforts to the production of copyrighted sound recordings should reasonably share in the income enjoyed by radio stations and other commercial organizations who use the recordings for profit.

This legislation would be an important step toward achieving one of the Endowment's major goals: To encourage and sustain development of creative American talent by helping to insure that American artists will receive a just financial return for their creative work.

Senator Scott, I was mentioning that since both of you gentlemen were interested in the National Endowment for the Arts, that in the legislation there are statements supporting the individual creative talent.

I mention this because the National Endowment for the Arts is a great agency. However, the National Council on the Arts has always been concerned that we assist in commenting and counseling on other legislation that is being considered by the Congress that will be of assistance to creative talent in the country.

It is these conditions today that I would like to speak to. I want to say that, Senator Scott, we know of your long term interest in this legislation and certainly you have been a pioneer in carrying it forward.

The main point of my testimony will be that in connection with the legislation, we are seeking to provide adequate and justified royalty payments for those people who have made it possible to have the recordings in the first place. I am talking about the creative artists themselves and the recording companies.

Without their combined creative efforts, we would not have sound recordings in song, in symphony, in folk. We simply would not have them at all.

Therefore, this is the main point that I would like to make this morning. The primary users of these recordings including the radio and TV broadcasters, the jukebox owners and background music companies, as we all know, utilize these creative properties to their commercial benefit every day.

It goes without saying, without the creative artists, the industries would not exist today because they would have nothing to play.

This bill has been the subject of a great deal of discussion over the past few years. The National Endowment for the Arts have joined many people who support the legislation. A few of our most persuasive reasons are: One, the Congress and the Copyright Office have recognized that sound recordings are a proper subject for copyright protection under the Constitution and the laws of the United States.

Two, composers, songwriters, and publishers, all of whom enjoy copyright protection under our laws, receive performance royalties. Three, 37 nations around the world recognize by law performance or recordmakers or both. Four, no undue hardship would be imposed on those industries.

Mr. Chairman, I understand the details of implementation have yet to be completely worked out.

There has been a general concern in our country about the lack of recordings in symphonic, operatic, and folk music. This bill could encourage the record companies to improve this situation.

We have in mind a cooperative program for classical or folk or perhaps a cooperative program that would serve to advance the years of young musicians, either in training or performance possibilities. This could be a wonderful side benefit of this piece of legislation.

I thank you very much for asking me to the hearings this morning.

Senator SCOTT. Mr. Wade, did you want to say anything?

Mr. WADE. No, Senator. I have nothing to add to that statement.

Senator McCLELLAN. I want to express my appreciation and thanks and assure you that I will weigh very carefully your recommendations.

Senator SCOTT. We thank you both.

[The prepared statement of Miss Nancy Hanks, Chairman, National Endowment for the Arts, appears in full as follows:]

STATEMENT OF MISS NANCY HANKS, CHAIRMAN, NATIONAL ENDOWMENT FOR THE ARTS

It is a pleasure to be here this morning to provide you with the views of the National Endowment for the Arts on S. 1111, a bill to establish a performance royalty in sound recordings for performing artists and record producers.

Mr. Chairman, the National Foundation on the Arts and the Humanities Act of 1965, as amended, the law creating the National Endowment for the Arts, contains an eloquent Declaration of Purpose. In that Declaration, the Congress states (among other things) that:

"... it is necessary and appropriate for the Federal Government to help create and sustain not only a climate of encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;" (emphasis added). I believe that this amendment to the Copyright Act of 1909, if enacted, would go a long way in correcting the present inequitable situation with regard to the commercial exploitation of the creative efforts of performing artists and record producers. I am, of course, speaking of the commercial use of the talent and skills of performing artists and record companies whose creative efforts bring to life and preserve in sound recordings a song, a sonata, or a symphony. The primary users of these recordings, i.e., the radio and television broadcasters, jukebox owners, background music companies, et al., as we all know, utilize these creative products to their commercial benefit every minute of every day, and, it goes without saying that without the creative efforts of performers and record makers, these industries would not exist as we know them today.

Mr. Chairman, this bill has been the subject of a great deal of discussion over the past few years. The Congress has been well informed as to the merits of this bill, and, as well, has heard some voices in opposition. As you know, the National Endowment and the Administration have joined those who support this proposed legislation. Rather than go through all of the numerous arguments that have been set forth in support of this bill, and with which we are in agreement, I would prefer to enumerate here some of those that seem most persuasive to the National Endowment for the Arts.

1. The Congress, the Courts, and the Copyright Office have all recognized that sound recordings are a proper subject for copyright protection under the Constitution and laws of the United States. As you know, the Sound Recording Amendment of 1971 provided for sound recording copyright protection against unethical record piracy. Litigation subsequent to enactment of the Sound Recording Amendment has resulted in judicial affirmation of the constitutionality of anti-piracy copyright protection for sound recordings.

2. Composers, song writers and publishers, all of whom similarly enjoy copyright protection under our laws, receive performance royalties.

3. Thirty-seven nations around the world now recognize by law performance rights for performers or record makers, or both, including the United Kingdom, West Germany, Japan, Italy, Sweden, Mexico, Spain, and Israel, to name but a few. An International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations was adopted in 1961. This convention, known as the Rome Convention, stated in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

So far the convention has been ratified by fifteen countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden.

4. No undue hardship would be imposed on those industries affected, since the relatively small (in terms of advertising and user revenue) additional costs of

performance royalties probably would be passed on to the ultimate economic beneficiaries of the commercial use of sound recordings, i.e., advertisers, jukebox users, background music users, et al. Further, it is my understanding that studies have shown that increased costs to the advertisers and other commercial users of sound recordings would be minimal.

Mr. Chairman, I understand that details of implementation have yet to be completely worked out by the various groups involved in the support of this legislation. While most such details are not a proper subject of concern for the National Endowment for the Arts, I would like to make one or two observations in this regard.

First, it is my understanding that the field (the record industry and the performing artists' unions) is in agreement with the principle that all performers on a given record would share equally in the distribution of royalties derived therefrom. That is, there would be an equal distribution of fees between a solo performer and his or her supporting musicians. I heartily endorse that principle.

Second, Mr. Chairman, we would favor an implementation approach which would insure substantial benefits to performing artists involved in the creation of artistic works falling outside the commercially successful category, i.e., the category of popular "hits". In other words, the National Endowment for the Arts would favor a distribution formula weighted in favor of symphonic, folk, operatic, or other musicians involved in the creation of artistic works which are worthy in themselves, but which by their nature do not have, at this time at least, the ability to generate mass sales. This is particularly important in view of the severe economic strain presently being felt by symphony orchestras, opera companies, and non-profit arts groups across the country. I might add that there has been a general concern in the country about the lack of recordings in symphonic, operatic and folk music. We believe that this bill could serve to encourage the record companies in this direction. And, further, that the opportunity to receive performance royalties will encourage musicians through their representative associations to seek ways in which there can be more recording in these art forms.

Finally, Mr. Chairman, I am most pleased to be able to report to you our understanding that the recording industry would be agreeable to a provision in this legislation which would allocate a certain percentage of the royalties it receives as a result thereof to the National Endowment for the Arts, to be used for purposes consistent with the Endowment's enabling legislation. The industry's attitude in this regard is most encouraging. This could have significant benefits for the Endowment's programs, being used for example, for the support of classical, folk, narrative, or other non-commercial recording projects, or perhaps for providing advance training opportunities for musicians wishing to further their careers.

In conclusion, Mr. Chairman, I heartily endorse the view that artists, musicians, and record companies who contribute their creative effort to the production of copyrighted sound recordings should reasonably share in the income enjoyed by radio stations and other commercial organizations who use the recordings for profit. This legislation would be an important step toward achieving one of the Endowment's major goals, to encourage and *sustain* development of creative American talent by helping to insure that American artists will receive a just financial return for their creative work.

Senator SCOTT. At this point I would like to add a few words. I have supported this extension of the performance royalty concept for the past 30 years, since I served on the Patents Committee in the House of Representatives. This matter has always seemed to me to be one of simple justice. But there are some who believe that since it was not originally established under the 1909 Copyright Act it should not be acted upon today.

The broadcasting industry has been a major opponent. Its major argument is that radio and television stations give free publicity to the artists and the record companies. The issue, as I see it, is whether or not a person who uses his creative talents to produce music should be entitled to compensation from someone who takes the music and makes a profit from it.

The hearings I chair today will seek to examine all aspects of the performance royalty. Both opponents and proponents of the issue

have been asked to appear and state their views. I am hopeful that when the hearings are concluded, the record will demonstrate as clearly as possible all aspects of the performance royalty issue.

The next witness is Miss Barbara Ringer, Register of Copyrights. We appreciate your being here and for the record we should show that you were appointed Register in 1973 after prior service, that you are an attorney, a member of the Bar in Washington, D.C., and an author. Miss Ringer, you may now proceed with your comments.

**STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS,
ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, THE
COPYRIGHT OFFICE**

Miss RINGER. Thank you, Mr. Chairman.

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress, and I appear here today in general support of the principle of copyright protection for the public performance of sound recordings.

Although I am unable to support the detailed provisions of S. 1111 in their present form, I am also in favor of the basic purpose and principle of the measure now before you for consideration.

The fundamental aim of S. 1111 is one with which I am in full agreement.

That is to create, within the framework of the Federal copyright law, a public performance right in sound recordings for the benefit of performers and record producers.

No one can claim that authors and composers are adequately protected under the present copyright laws, but since 1909 they have at least been accorded enforceable rights of public performance against commercial users of their works other than jukebox operators.

Sound recordings are, in my opinion, just as creative and worthy of protection as musical compositions. Yet sound recordings have been recognized as copyrightable under the Federal copyright law since 1972, and their creators still receive no royalties whatever from the public performance for profit of their copyrighted works.

This is an inequity that in keeping with the constitutional aim of encouraging and recognizing creative endeavor, Congress should redress without further delay. How it should go about doing so is a more difficult question.

Whether a performance right should be extended to sound recordings under Federal copyright legislation has been a controversial issue in the United States for many years. Until very recently opinions have been divided among the various representatives of performers and record producers as to how the problem should be approached.

For a long time the very idea of performance royalties for recordings was sharply contested, not only by users such as broadcasters, but also by other copyright owners who are now receiving royalties. It was certainly true, as was stated by my predecessor, Mr. Kamenstein, as Register of Copyrights in the early 1960's and by various congressional committee reports up to 1967, opinion on this question remained too uncrystallized to make legislation practicable.

This situation began to change in the late 1960's and today appears to be radically different. Opposition to the proposal for a performance

royalty for sound recordings appears to be limited to those groups that would actually have to pay the royalty, notably broadcasting organizations, and their opposition appears to be based primarily on economic considerations.

In the fall of 1971 Congress amended the 1909 Copyright Act to establish limited copyright protection for sound recordings, in an effort to stamp out the phenomenon of record and tape piracy. This amendment, which came into effect on February 15, 1972, was immediately challenged in the courts on constitutional grounds, and survived this judicial test in *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).

This recognition by Congress and the courts of sound recordings as the writings of an author within the meaning of the copyright clause of the Constitution has gone a long way toward gaining acceptance for sound recordings as creative works fully worthy of copyright protection.

Equally important in this process has been the growing recognition that the whole creative process through which music comes into existence and reaches the ears of the public has undergone a fundamental change. The lines between musical composition, musical performance, and musical recording have broken down almost completely.

For anyone today to deny the contributions of performers and record makers to this continuous creative process is to fly in the face of reality.

As I wrote to Senator Scott last year, I have no doubt whatsoever of the constitutionality of a record performance royalty. In my statement I support that and quote from that letter which I wrote to you. I would like to submit my entire statement for the record.

Senator Scott. It will be inserted at the end of your statement.

Miss RINGER. I now go to page 7 of my statement.

Congress and the courts have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle established any broadening of protection for sound recordings to include a public performance right becomes one not of constitutionality but of statutory policy.

In considering this pivotal policy question, Congress should first take a hard look at just what the lack of copyright protection for performers has done to the performing arts profession in the United States.

The 20th century technological evolution in communications has had a fundamental impact on a number of forms of creative expression, but there is no case in which the impact was more drastic or destructive than that of the performing artist.

Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.

The results have been tragic: The loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wallsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programming, have been equally malign. Most of all it is the U.S. public that has suffered from this process.

Congress cannot repair these past wrongs, but it can and should do something about avoiding or minimizing them in the future. There is, in the United States today, no more vital and creative force than that of performed music.

Adequate protection for those responsible for this creative force involves much more than economics and the ability or willingness of various communications media to pay performing royalties.

It is, first of all, a matter of justice and fairness; but beyond that it is in the paramount national interest to insure that growth in the creativity and variety of the performing arts in this country is actively encouraged by reasonable protection, rather than stunted or destroyed by lack of it.

The revision bill introduced by Senator McClellan in the 93d Congress, S. 1361, included a record performance royalty, subject to a compulsory license. This provision—section 114—did not survive Senate consideration of the bill last year, and was deleted before passage of the revision bill. S. 1111 is patterned on section 114, but there are important technical differences resulting from its presentation as an amendment of the Copyright Act of 1909 rather than as a part of the general revision program.

I had some question as to whether the compulsory license system envisioned in last year's section 114 could be completely satisfactory as a procedural matter, but at least it had the administrative framework and safeguards necessary for the practical operation of any compulsory licensing scheme.

It is because this framework and these safeguards are lacking in S. 1111 that I cannot support the bill as a technical matter.

I would now like to skip to page 13 of the statement.

Senator SCOTT. Your opposition is not to the purpose of the bill or to the enactment of the bill but to the correction of what you feel are technical liabilities to its proper implementation?

Miss RINGER. That is quite correct. I think I will confirm this in the remainder of my statement.

These are serious technical problems, but there is no doubt that they could be resolved, either by substantial further amendments to the 1909 act or by restoring and revision of section 114 of the general revision bill—S. 22.

To my mind it is less important whether the performance royalty for sound recordings be established under the revision bill or separate legislation than that Congress act affirmatively by declaring itself in favor of the principles of such a payment.

Whatever form the legislation takes, I recommend that such a step be taken by the present Congress, and that, recognizing the damaging effects of legislative inaction in the past, it not again postpone this affirmative declaration to another Congress, or another decade, or another generation.

At the same time it must be said, on the basis of experience, that if this legislation were tied to the fate of the bill for general revision of the copyright law there is a danger that it could turn into a killer provision that would again stall or defeat the omnibus legislation.

This danger exists, and it would be very real if the potential compulsory licensees, notably the broadcasting and jukebox industries, exerted their considerable economic and political power to oppose the

revision bill as a whole. Should this happen, there could be no question about priorities; the performance royalty for sound recordings would have to yield to the overwhelming needs for omnibus reform of the 1909 copyright law.

The opposition of broadcasters, music operators, wired music services, and other users of recorded performances to paying additional performance royalties and handling additional paperwork is certainly understandable on purely economic grounds.

But as Miss Hanks so eloquently said, these services are part of a continuum that relies for its very existence on the creative efforts of authors, composers, performers, and recordmakers. It is naive and unrealistic of me to hope that the commercial users of music could realize the benefit to their own interests of doing everything reasonably possible to promote the economic interests of those who work it is their business to purvey?

Would it be too much to hope that, recognizing that they are all part of the same process, the users of copyrighted sound recordings could accept the principle of performance royalties, and could sit down with the performers and recordmakers to work out a reasonable compulsory licensing system?

The alternative, no one need be told, is years more of wrangling in the legislative arena, with people pitted against each other who should be working together for their mutual benefit.

Once the principle of performance royalty is established, the alternative ways of implementing it are not confined to S. 1111 or section 114 of the earlier revision bill. An obvious possibility could be for Congress to accept the principle of payment, but delay implementation for a period long enough to allow the working out of a viable compulsory licensing procedure.

Another possibility would be, as in the case of the previous legislation establishing copyright for sound recordings to put a terminal date on the legislation, leaving it to a future Congress to judge, on the basis of actual experience, whether it should be extended permanently.

Other alternatives might include a transitional period during which all payments would go to the National Endowment for the Arts while a workable procedure for distributing license fees to individual copyright owners was being worked out.

I am not committed to any of these or other alternatives. But I do express the hope that they might be explored in a spirit of good will and give and take, with the aim of providing a framework in which the fairest, least burdensome payment mechanism could be established.

The Senate Judiciary Committee and Senator Scott in particular have done the public a real service in seeking solutions to this important problem, and there is no doubt in my mind that, sooner or later, their efforts will meet with the success they deserve.

Thank you, Mr. Chairman.

Senator Scott. Miss Ringer, thank you very much. Your statement will be very useful to the Committee. It expresses a balanced point of view and suggests several alternatives which I assure you this committee will consider very carefully. Thank you both for appearing.

[The prepared statement of Miss Barbara Ringer, Register of Copyrights appears in full as follows:]

STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS ON S. 1111, A BILL
TO AMEND THE COPYRIGHT ACT OF 1909 TO ESTABLISH A PERFORMANCE ROY-
ALTY FOR SOUND RECORDINGS

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress. I appear today in general support of the principle of copyright protection for the public performance of sound recordings. Although I am unable to support the detailed provisions of S. 1111 in their present form, I am also in favor of the basic purpose and principle of the measure now before you for consideration.

The fundamental aim of S. 1111 is one with which I am in full agreement: to create, within the framework of federal copyright law, a public performance right in sound recordings for the benefit of performers and record producers. No one can claim that authors and composers are adequately protected under the present copyright law, but since 1909 they have at least been accorded enforceable rights of public performance against commercial users of their works other than jukebox operators. Sound recordings are, in my opinion, just as creative and worthy of protection as musical compositions. Yet sound recordings have been recognized as copyrightable under the federal copyright law only since 1972, and their creators still receive no royalties whatever from the public performance for profit of their copyrighted works. This is an inequity that, in keeping with the constitutional aim of encouraging and recognizing creative endeavor, Congress should redress without further delay. How it should go about doing so is a more difficult question.

Whether a performance right should be extended to sound recordings under federal copyright legislation has been a controversial issue in the United States for many years. Until very recently opinions have been divided among the various representatives of performers and record producers as to how the problem should be approached. For a long time the very idea of performance royalties for recordings was sharply contested, not only by users such as broadcasters, but also by other copyright owners who are now receiving royalties. It was certainly true, as was stated by my predecessor, Mr. Kamenstein, as Register of Copyrights in the early 1960's and by various Congressional committee reports up to 1967, that opinion on this question remained too uncrystallized to make legislation practicable.

This situation began to change in the late 1960's, and today appears to be radically different. Opposition to the proposal for a performance royalty for sound recordings appears to be limited to those groups that would actually have to pay the royalty, notably broadcasting organizations, and their opposition appears to be based primarily on economic considerations. In the fall of 1971 Congress amended the 1909 Copyright Act to establish limited copyright protection for sound recordings, in an effort to stamp out the phenomenon of record and tape piracy. This amendment, which came into effect on February 15, 1972, was immediately challenged in the courts on constitutional grounds, and survived this judicial test in *Shaw v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972).

This recognition by Congress and the courts of sound recordings as the "writings of an author" within the meaning of the copyright clause of the Constitution has gone a long way toward gaining acceptance for sound recordings as creative works fully worthy of copyright protection. Equally important in this evolution has been the growing recognition that the whole creative process through which music comes into existence and reaches the ears of the public has undergone a fundamental change. The lines between musical composition, musical performance, and musical recording have broken down almost completely. For anyone today to deny the contributions of performers and record makers to this continuous creative process is to fly in the face of reality.

As I wrote to Senator Scott last year, I have no doubt whatsoever of the constitutionality of a record performance royalty:

Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute. [Letter from Barbara Ringer to Senator Hugh Scott, July 31, 1974]

The basic constitutional criterion for copyright protection is that the work must

qualify as the "writing of an author." It is well settled that this phrase must be construed broadly and permits copyright in the original, creative expression of authors, artists, and other creators, whatever tangible form that expression may take. No one should doubt the immense creative, artistic contribution of performing artists who interpret the work of other creators.

The common law courts recognized this principle as early as the 1930's. In *Waring v. WDAS Broadcasting Station, Inc.*, 35 U.S.P.Q. 272 (Pa. Sup. Ct. 1937), Judge Stern wrote:

The law has never considered it necessary for the establishment of property rights in intellectual or artistic productions that the entire ultimate product should be the work of a single creator; such rights may be acquired by one who perfects the original work or substantially adds to it in some manner. . . . A musical composition in itself is an incomplete work; the written page evidences only one of the creative acts which are necessary for its enjoyment; it is the performer who must consummate the work by transforming it into sound. *Id.* at 275.

A few years later Judge Leibell expressed the same view, asserting that the right of the performing artist had existed for a long time, but there had been no need or possibility of enforcement before the invention of mechanical recording devices. *RCA Manufacturing Company, Inc. v. Whiteman*, 43 U.S.C.P.Q. 114, 116 (S.D.N.Y. 1939), *reversed on other grounds*, 114 F. 2d 86 (2d Cir.), *cert denied*, 311 U.S. 712 (1940).

It was Judge Learned Hand who reversed Judge Leibell on other grounds in the *RCA v. Whiteman* case, but fifteen years later he expressed his clear agreement with Judge Leibell's views on the nature of the original authorship in an artist's performance of music. In his famous dissent in *Capital Records, Inc. v. Mercury Records Corp.*, 221 F. 2d 657, 664 (2d Cir. 1955), he graphically described the performer's contribution:

Musical notes are composed of a fundamental note with harmonics and overtones which do not appear on the score. There may indeed be instruments . . . which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a composition as an arrangement or adaptation of the score itself, which [Section] 1 (b) makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution. *Id.* at 664.

Congress and the courts have already declared that sound recordings as a class are constitutionally eligible for copyright protection. With this principle established, any broadening of protection for sound recordings to include a public performance right becomes one not of constitutionality but of statutory policy.

In considering this pivotal policy question, Congress should first take a hard look at just what the lack of copyright protection for performers has done to the performing arts profession in the United States. The Twentieth Century technological revolution in communications has had a fundamental impact on a number of forms of creative expression, but there is no case in which the impact was more drastic or destructive than that of the performing artist. Performers were whipsawed by an unmerciful process in which their vast live audiences were destroyed by phonograph records and broadcasting, but they were given no legal rights whatever to control or participate in the commercial benefits of the vast new electronic audience.

The results have been tragic: the loss of a major part of a vital artistic profession and the drying up of an incalculable number of creative wellsprings. The effect of this process on individual performers has been catastrophic, but the effect on the nature and variety of records that are made and kept in release, and on the content and variety of radio programming, have been equally malign. Most of all it is the United States public that has suffered from this process.

Congress cannot repair these past wrongs, but it can and should do something about avoiding or minimizing them in the future. There is, in the United States today, no more vital and creative force than that of performed music. Adequate protection for those responsible for this creative force involves much more than economics and the ability or willingness of various communications media to pay performing royalties. It is, first of all, a matter of justice and fairness; but, beyond that, it is in the paramount national interest to insure that growth in the creativity and variety of the performing arts in this country is actively encouraged by reasonable protection, rather than stunted or destroyed by the lack of it.

The revision bill introduced by Senator McClellan in the 93rd Congress (S. 1361) included a record performance royalty, subject to a compulsory license. This provision (section 114) did not survive Senate consideration of the bill last year, and was deleted before passage of the revision bill. S. 1111 is patterned on section 114, but there are important technical differences resulting from its presentation as an amendment of the Copyright Act of 1909 rather than as a part of the general revision program. I had some question as to whether the compulsory license system envisioned in last year's section 114 could be completely satisfactory as a procedural matter, but at least it had the administrative framework and safeguards necessary for the practical operation of any compulsory licensing scheme. It is because this framework and these safeguards are lacking in S. 1111 that I cannot support the bill as a technical matter.

Under S. 1111, section 1 of the present law would be amended to include the right to perform publicly for profit a copyrighted sound recording, subject to a compulsory license (section 33). Performances of sound recordings on jukeboxes are also made subject to the record performance right. A negotiated license may be substituted for the compulsory license of section 33, but the royalties cannot fall below the statutory rates.

Royalty fees may be computed on either a blanket or prorated basis, at the option of the user. Blanket fees for radio stations range from \$250 annually for stations with gross receipts from advertising of more than \$25,000 but less than \$100,000 to one percent of the net receipts from advertising for stations with gross receipts in excess of \$200,000. Radio stations with gross receipts under \$25,000 pay no royalty. In the case of television stations the rates are much lower because of less frequent use of recorded music. Stations with gross receipts from advertising between one and four million dollars pay \$750 annually. Stations with gross receipts in excess of four million pay \$1500, and those with receipts under one million pay no royalty. Background music services and cable systems would pay two percent of gross receipts from subscribers; if receipts are under \$10,000, no payment is due. The jukebox rate is one dollar per player. All other nonexempt users pay \$25 annually for each location where recordings are performed or a separate performance rate not to exceed \$5 per day of use.

The statutory rates for television stations have been substantially reduced from those formerly in section 114 of the revision bill, which treated radio and television stations on the same basis. S. 1111 establishes a divergence in rates, presumably in recognition of the concentrated use of recorded music on radio, which is estimated to reach 75 percent of radio programming. Another significant change is the exemption for background music, if the gross receipts are less than \$10,000.

The compulsory license mechanism of the former section 114 of the revision bill enlisted the Register of Copyrights as the recipient of royalty payments which were to be distributed equally between performers and copyright owners of sound recordings. In the event of a controversy over distribution the Copyright Royalty Tribunal created by the revision bill would have been convened to resolve it. The Tribunal also would have been empowered to review the statutory royalty rates.

The compulsory license system of S. 1111 does not appear to represent an adequate substitute for the revision bill's two-step procedure, which relies first on the Copyright Office and second on the Royalty Tribunal. The present law of course neither empowers the Register of Copyrights to participate in the compulsory license without additional statutory direction nor includes any feature remotely comparable to the Royalty Tribunal.

Section 33 relies instead on an arbitration panel empowered to establish new royalty rates (after a two year period) and to set the terms of the license in the event the parties are unable to agree on a negotiated license. Unlike the rates set by the Royalty Tribunal operating under the revision bill, the rates set by the arbitration panel under S. 1111 are not subject to review by Congress. I regard this omission as a serious defect in the ratemaking procedure.

An equally critical defect stems from the absence of any statutory recipient for the royalties due under compulsory licensing, although section 33 states the fees collected shall be divided equally between performers and owners of sound recordings. I assume that this omission arises from two expectations: first, that negotiated agreements will be the rule, possibly obviating the need for a statutory recipient; and second, that the private sector will establish a licensing mechanism to receive both negotiated and compulsory licensing fees. I will not speculate about the likelihood of either expectation coming to fruition. However, the first

expectation is severely undermined by the omission of an antitrust exemption which would facilitate negotiated licensing. I also have great doubt about the advisability of establishing blanket compulsory license fees without creating a statutory recipient, even assuming that few compulsory licenses will be exercised. The existing compulsory licensing system (for mechanical reproduction of music) establishes a per-use rate and directs that payment be made to the copyright proprietor. This relatively simple system cannot be compared to the record performance royalty for which a blanket payment can be made annually for *all* uses of *all* copyrighted sound recordings. Obviously, payment would not be made to each copyright proprietor.

These are serious technical problems, but there is no doubt that they could be resolved, either by substantial further amendments to the 1909 Act or by restoring and revising section 114 of the general revision bill (S. 22). To my mind it is less important whether the performance royalty for sound recordings be established under the revision bill or separate legislation than that Congress act affirmatively by declaring itself in favor of the principle of such a payment. Whatever form the legislation takes, I recommend that such a step be taken by the present Congress, and that, recognizing the damaging effects of legislative inaction in the past, it not again postpone this affirmative declaration to another Congress, or another decade, or another generation.

At the same time it must be said, on the basis of experience, that if this legislation were tied to the fate of the bill for general revision of the copyright law there is a danger that it could turn into a "killer" provision that would again stall or defeat the omnibus legislation. This danger exists, and it would be very real if the potential compulsory licensees, notably the broadcasting and jukebox industries, exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities; the performance royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 copyright law.

The opposition of broadcasters, music operators, wired music services, and other users of recorded performances to paying additional performance royalties and handling additional paperwork is certainly understandable on purely economic grounds. But as Miss Hanks so eloquently said, these services are part of a continuum that relies for its very existence on the creative efforts of authors, composers, performers and record makers. Is it naive and unrealistic of me to hope that the commercial users of music could realize the benefit to their own interests of doing everything reasonably possible to promote the economic interests of those whose work it is their business to purvey? Would it be too much to hope that, recognizing that they are all part of the same process, the users of copyrighted sound recordings could accept the principle of performance royalties, and could sit down with the performers and record makers to work out a reasonable compulsory licensing system? The alternative, no one need be told, is years more of wrangling in the legislative arena, with people pitted against each other who should be working together for their mutual benefit.

Once the principle of performance royalty is established, the alternative ways of implementing it are not confined to S. 1111 or section 114 of the earlier revision bill. An obvious possibility would be for Congress to accept the principle of payment, but delay implementation for a period long enough to allow the working out of a viable compulsory licensing procedure. Another possibility would be, as in the case of the previous legislation establishing copyright for sound recordings, to put a terminal date on the legislation, leaving it to a future Congress to judge, on the basis of actual experience, whether it should be extended permanently. Other alternatives might include a transitional period during which all payments would go to the National Endowment for the Arts while a workable procedure for distributing license fees to individual copyright owners was being worked out.

I am not committed to any of these or other alternatives. But I do express the hope that they might be explored in a spirit of good will and give-and-take, with the aim of providing a framework in which the fairest, least burdensome payment mechanism could be established. The Senate Judiciary Committee, and Senator Scott in particular, have done the public a real service in seeking solutions to this important problem, and there is no doubt in my mind that, sooner or later, their efforts will meet with the success they deserve.

Senator Scott. Will the remaining proponents of the bill please come forward to the witness table at this time.

We will begin with Mr. Sanford Wolff, Mr. Golodner, Mr. Hightower, and Mr. Stanley Gortikov, president of the Record Industry Association. Your statements will be printed in the record in connection with your testimony.

Let me note that Mr. Wolff is a lawyer who has served as executive secretary of the American Federation of Television and Recording Artists since 1968 and has practiced law in Chicago since 1945, was admitted to the New York Bar in 1973. We are very glad to have all of you gentlemen here today.

STATEMENTS OF A PANEL COMPOSED OF SANFORD I. WOLFF, EXECUTIVE SECRETARY, AMERICAN FEDERATION OF TELEVISION & RADIO ARTISTS, AFL-CIO; JACK GOLODNER, EXECUTIVE SECRETARY, COUNCIL FOR PROFESSIONAL EMPLOYEES, AFL-CIO; JOHN HIGHTOWER, CHAIRMAN, ADVOCATES FOR THE ARTS; STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA; HENRY KAISER, GENERAL COUNSEL, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO

Mr. WOLFF. May I begin, sir, by expressing the appreciation and recognition of both the American Federation of Musicians and the American Federation of Radio & Television Artists. We recognize that you may well prove Mr. Lincoln's quote that one man with a conscience does often make a majority.

I think that was Mr. Lincoln. May I also start by recalling something Miss Han's said? One of her statements may have puzzled some of you because we have tried to make clear that it is not the solo artist and the musicians alone we are talking about.

Any royalties to be gained from this legislation would be shared by all of the performers on a record because as you probably know, almost every record has not only a solo artist but a group of supporting and background singers whose importance to the recording is known to everybody in the industry. It is our intention that all persons on a record will share equally.

And now, Mr. Chairman, with your permission may I present our statement?

My name is Sanford Wolff and I am the chief executive of the American Federation of Television & Radio Artists, AFL-CIO, the collective bargaining representative of all the singers you have heard or seen on radio, television, and phonograph records.

Because of the unavoidable absence of musicians' president, Hal C. Davis, who is out of the country, I am privileged today to speak not only on behalf of the 30,000 actors, announcers, dancers, news correspondents, and singers who constitute AFTRA, but also on behalf of some 330,000 members of the American Federation of Musicians.

I should like at this time to introduce my distinguished colleague, Mr. Henry Kaiser, who as you may know, has for many years been general counsel of the American Federation of Musicians. Mr. Kaiser will be happy to participate in any subsequent discussion.

My mission is to voice the common aspiration of all American performers that creative citizens at long last be granted copyright

protection that would provide a small measure of participation in the revenues derived from the highly profitable exploitation of their recorded performances.

Mr Chairman and distinguished members of this committee, the time for the relief that we have been vigorously pursuing for some 40 years—the time for realizing the modicum of justice these artists so eminently deserve is now. It has been too long delayed.

Let me recite briefly some relevant history. In 1940, the Shotwell Committee, after 3 years of study, omitted recognition of performers' rights from a then proposed revision of the copyright law because, and I quote, "thought had not yet become crystallized on the subject * * * and no way could be found at the present time for reconciling the serious conflicts of interest arising in the field."

Twenty-one years later, in 1961, the Register of Copyrights, after many years of further intensive study, reported to Congress that the issues "have not yet crystallized" and that "detailed recommendations are being deferred pending further study."

And 5 years after that in 1966, the House Committee on the Judiciary accurately and sympathetically summarized the argument advanced on behalf of performing artists, and acknowledged that "there was little direct response to those arguments" but because of the then existing concerted opposition failed to accept our pleas specifically noting "the possibility of full consideration of the question by a future Congress."

We now have had 8 more years of experience and we are pleased to report a significant melting away of that concerted opposition. Unlike 8 years ago, we now have total agreement between the performing artists and the recording industry.

Unlike 8 years ago, we now have the unqualified support of the Register of Copyrights. On top of that, we now enjoy the support of the current administration, the National Endowment for the Arts, and other influential groups from whom you will hear.

In sum the only real opposition is that of a powerful combination of commercial entrepreneurs enjoying public gifts of airwave monopolies and prospering enormously on the uncompensated talents of our members, who, if I may be permitted the luxury of what is rapidly becoming a neoclassic expression—have thechutzpah to insist upon perpetuating an unconscionable exploitation.

It is to me and to the thousands I am privileged to speak for, unthinkable for that kind of opposition to carry any weight with the Congress of the United States.

The legislation being considered should present little indecision to the Congress. Its morality presents no mind-boggling challenge. It must be obvious that using a person's labors and talents to enrich oneself without compensating that person is less than ethical.

It is hard to believe that the validity of the statement is less than self-evident. If at the same time one uses another person's work, without compensation, to fill his own purse, and to replace another person whose living was earned by providing the same service, then the practice becomes thoroughly indefensible.

It is a practice which at the same time creates unjust enrichment and unjust unemployment.

Not too many years ago broadcasters employed musicians and singers on a full time basis. We called it staff. There was an orchestra and a small group of singers who provided the music that was broadcast.

Those people worked in many ways and on a variety of programs. Some of us still remember, with considerable fondness, Toscanini and the NBC Orchestra and the Riders of the Purple Sage. Though perhaps at the opposite ends of the musical scale, these American musicians and singers were employed to provide popular programming features for the American listening audience.

Maestro Toscanini and the Riders are no longer with us, but their recorded music remains and continues, without cost to the broadcasters, without compensation to their heirs, and competes unfairly for jobs needed by their talented successors.

A Martian would find it incredible that we appear here with hat in hand for the passage of this legislation. Where else in the United States does one have to beg to get paid for the use of his work when the users of his work acknowledge the value of the product and grow rich on it? This is madness—unfounded in logic, ethics, or economics.

The performers I represent here make an obvious, ever increasing contribution to the programming of radio and TV stations. Basic American fairness requires that they be recognized and compensated.

Please disabuse yourselves of the notion so widely cultivated by our opposition that the sales of records directly reflect the number of times the record is played on the air. Even accepting the arrogant premise that radio stations spend 75 percent of their air time out of eleemosynary concern for the record industry—and in disregard of their own profits—that notion is simply not true.

Sales often suffer from overexposure and overplay on radio. Simply put, why buy a record when you can hear it free?

Put out of your minds, too, the canard propagated by the broadcaster that artists grow rich because of record sales.

Present here today are men and women unknown to you. No Sinatras, Diana Ross, Elvis Presley, Johnny Cash, Fifth Dimension—no Perry Como, Kate Smith, Johnny Mann here; but on the records made by those stars and played on radio stations throughout the land, these people present contributed their invaluable services—their performances were heard.

And so that there be a final end to the phony argument being made by the opposition I am pleased to advise you that the two performing unions have reached a firm agreement under which all performers will share equally in the royalty.

For example, if on a Frank Sinatra record there are 10 musicians and 5 background singers, the royalty would be split equally among the 16 people.

Let me tell you something about the performers here with us today, and they, too, are prepared to answer any questions you may desire to ask of them about the record business.

Mr. David Grupp, a professional drummer who for 62 years has played for symphonies, on network television, recordings, theaters, clubs—even weddings. Many of the thousands of records he has worked on still being extensively broadcast, and he has never received a penny from the radio stations who profit from his talent.

William Ackerman, born and raised in Nashville, has been making popular, country, and rock and roll recordings since 1960. At least 100 of the more than 5,000 recordings that Bill has made have gone over the million mark. He hears his product played on radio stations all over the country, but he is not paid for or consulted about the broadcast of his talents.

Ralph Mendelson's instrument is viola. He has been with the New York Philharmonic for 23 years. When he joined the orchestra in 1953, its musicians were able to augment their earnings by radio broadcast fees. Today the Philharmonic's music is still used on radio to an even greater extent, but it is recorded and Mr. Mendelson and the other members of the orchestra get nothing.

Louis Nunley of Nashville is probably the most recorded bass singer in the world. He's been a background singer since 1953, with thousands of records to his credit. Over 1,500 of these have made the broadcast charts, and more than 200 made the top 10 in radio play. Lou never received a penny for the broadcast of his records.

Lois Winter has been a successful classical and popular vocalist for 25 years. She has performed as a background singer for every kind of recording, literally from A to Z—beginning with the Ames Brothers to Jazz Fiddler Florian Zabach. Remember Mitch Miller's record, "The Yellow Rose of Texas"? Lois, who has a masters degree in music theory, got \$16 for the initial session fee, and nothing for the thousands of subsequent radio plays of that record.

Lillian Clark, like Miss Winter, is a working singer living in New York. She began her career with the Clark Sisters, and has sung with such groups as the Skylarks, and the Sentimentalists with Tommy Dorsey. She and Miss Winter together have participated in thousands of New York recording sessions over a span of 25 years. Like the others, Miss Clark has received nothing for the radio plays of her work.

Sherlie Matthews is one of the busiest singers in Los Angeles, devoting a major portion of her time and talent to recordings. You hear her voice every morning on the radio as you drive to work, and every night as you drive home. Sherlie is in demand because her talent is unique, and her "sound" is popular. But she is not helped by use of her recordings by broadcasters. Indeed, overexposure may shorten the length of her career. Sherlie and two other ladies whose names you would not recognize were the Supremes, a group whose records were played thousands of times—no payment to Sherlie.

Ron Hicklin, also from Los Angeles, has a list of titles longer than my arm. He's sung with Frank Sinatra, the Partridge Family, the Monkees, Andy Williams. Mr. Hicklin has received and continues to receive the magnificent sum of union scale—\$18 when he began, \$30 now. Nothing for the countless replays for profit on the public airwaves.

These and thousands of their anonymous colleagues are the people who bring the incomparable joys of music to America and to a large extent bring America to the world.

These people and their colleagues are the indispensable source the huge profits of the broadcasting industry.

It is our fervent plea that they be granted the recognition and compensation so long and so sadly overdue.

We are deeply appreciative for this opportunity.

Senator SCOTT. If one bell goes up, it is a vote and I may have to leave for a few minutes.

Mr. Wolff, I thank you for your testimony. I have found it an onerous business pushing the same bill since 1941. There are people who regard me as ordinarily reliable. They regard me as perhaps a little crazy for pursuing this particular bill. However it is the simple justice of the situation which has encouraged me to pursue it since the days when Fred Waring first brought it to my attention. We will continue to see what we can do.

Section 114 of S. 1361, 93d Congress, a provision of mine, was approved in the Judiciary Committee but struck in the Senate by Senator Ervin of North Carolina, that great champion of the rights of the individual, if you will recall. [Laughter.]

Senator SCOTT. I felt it was better this Congress to introduce it as separate legislation. There are various opposing views we will get into later. We are not precluding anyone who has a better idea. Mr. Wolff, what is the percentage of musicians that rely on record royalties for their income?

Mr. WOLFF. Infinitesimally small. Senator, I may be wrong, but in the 20 years that I have been involved in this business both as a lawyer and as a union executive, I know of no performer who can rely on record royalties as presently known for his livelihood.

Senator SCOTT. I know that my royalties as an author of books can be stated in the hundreds of dollars rather than the thousands. I don't get very much for them. Is there any way of determining the average income of a recording artist?

Mr. WOLFF. Well, we have to make certain of our terms first.

Senator SCOTT. That is right.

Mr. WOLFF. Most people when they use the term recording artist, think about the soloist, the Frank Sinatra, the Beverly Sills and so forth.

Senator SCOTT. I am thinking of all the musicians.

Mr. WOLFF. The singers and the musicians. I can't give you an average, but I know an awfully lot of singers and musicians who since recorded performances became the mainstay of programing on radio have been unemployed. There are an awful lot of them whose income is less than \$2,000 a year from their chosen professions.

Senator SCOTT. What is the average period of a solo artist's artistic career?

Mr. WOLFF. I would say 10 years is outside, long outside. It is a difficult question to answer because I think with fondness of Ms. Peggy Lee who breaks all records.

Senator SCOTT. Or Kate Smith.

Mr. WOLFF. Or Ms. Kate Smith obviously. However, when you think of those names that were so big so long, we only think it was for so long. You just don't see them anymore. But we do hear their records. They get probably nothing for that—we know they get nothing for the broadcast and there are no sales.

Senator SCOTT. I have spoken with artists who state they have to put in 10 cents in a machine to hear their own work for which there is no compensation.

Mr. WOLFF. That is correct. One other factor that should be brought out, is each week, we have found that only five or six new records are

added to what is known as the playlist of a radio station. Some stations more, some less. The rest of the programing time (and it is acknowledged at least 75 percent of all programing broadcast time is taken up with sound recordings), the rest of it is taken up with records that were made many, many years ago and are not even in the catalogs of the record companies and certainly are not on the shelves of the record store.

[The statement of Mr. Sanford I. Wolff, on behalf of The American Federation of Musicians (AFL-CIO) and The American Federation of Television and Radio Artists (AFL-CIO), appears in full as follows:]

STATEMENT OF MR. SANFORD I. WOLFF, ON BEHALF OF THE AMERICAN FEDERATIONS OF MUSICIANS AND TELEVISION AND RADIO ARTISTS (AFL-CIO)

My name is Sanford I. Wolff. I am the Chief Executive of the American Federation of Television and Radio Artists, AFL-CIO, the collective bargaining representative of all the singers you have heard or seen on radio, television and phonograph records.

Because of the unavoidable absence of Musicians' President Hal J. Davis, who is out of the country, I am privileged today to speak not only on behalf of the 30,000 actors, announcers, dancers, news correspondents and singers who constitute AFTRA, but also on behalf of some 330,000 members of the American Federation of Musicians.

I should like at this time to introduce my distinguished colleague Mr. Henry Kaiser who, as you may know, has for many years been General Counsel of the American Federation of Musicians. Mr. Kaiser will be happy to participate in any subsequent discussion.

My mission is to voice the common aspiration of all American performers that creative citizens at long last be granted copyright protection that would provide a small measure of participation in the revenues derived from the highly profitable exploitation of their recorded performances.

Mr. Chairman and distinguished members of this committee, the time for the relief we have been vigorously pursuing for some 40 years—the time for realizing the modicum of justice these artists so eminently deserve is now. It has been too long delayed.

Let me briefly recite some relevant history. In 1940 the Shotwell Committee, after three years of study, omitted recognition of performers' rights from a then proposed revision of the copyright law because, and I quote, "thought has not yet become crystalized on the subject . . . and no way could be found at the present time for reconciling the serious conflicts of interest arising in the field."

Twenty-one years later, in 1961, the Register of Copyrights, after many years of further intensive study, reported to Congress that the issues "have not yet crystalized" and that "detailed recommendations are being deferred pending further study."

And five years after that, in 1966, the House Committee on the Judiciary accurately and sympathetically summarized the argument advanced on behalf of performing artists, and acknowledged that "there was little direct response to those arguments" but, because of the then existing "concerted opposition," failed to accept our pleas specifically noting "the possibility of full consideration of the question by a future Congress."

We now have had eight more years of experience and we are pleased to report a significant melting away of that "concerted opposition." Unlike eight years ago, we now have total agreement between the performing artists and the recording industry.

Unlike eight years ago, we now have the unqualified support of the Register of Copyrights.

On top of that, we now enjoy the support of the current Administration, The National Endowment for the Arts, and other influential groups from whom you will hear.

In sum, the only real opposition is that of a powerful combination of commercial entrepreneurs enjoying public gifts of air-wave monopolies and prospering enormously on the uncompensated talents of our members, who—if I may be permitted the luxury of what is rapidly becoming a neoclassic expression—have the "Chutzpah" to insist upon perpetuating an unconscionable exploitation.

It is to me, and to the thousands I am privileged to speak for, unthinkable for that kind of opposition to carry any weight with the Congress of the United States.

The legislation being considered should present little indecision to the Congress. Its morality presents no mind-boggling challenge. It must be obvious that using a person's labors and talents to enrich oneself without compensating that person is less than ethical. It is hard to believe that the validity of that statement is less than self-evident. If, at the same time one uses another person's work, without compensation, to fill his own purse, and to replace another person whose living was earned by providing the same service, then the practice becomes thoroughly indefensible.

It is a practice which creates at the same time unjust enrichment and unjust unemployment.

Not too many years ago broadcasters employed musicians and singers on a full-time basis. We called it staff. There was an orchestra and a small group of singers who provided the music that was broadcast. Those people worked in many ways and on a variety of programs. Some of us still remember, with considerable fondness, Toscanini and the NBC Orchestra and the Riders of the Purple Sage. Though perhaps at the opposite ends of the musical scale, these American musicians and singers were employed to provide popular programming features for the American listening audience. Maestro Toscanini and the Riders are no longer with us, but their recorded music remains and continues, without cost to the broadcasters, without compensation to their heirs, and competes unfairly for jobs needed by their talented successors.

A Martian would find it incredible that we appear here with hat in hand for the passage of this legislation. Where else in these United States does one have to beg to get paid for the use of his work when the users of his work acknowledge the value of the product and grow rich on it? This is madness—unfounded in logic, ethics or economics.

The performers I represent here make an obvious, ever-increasing contribution to the programming of radio and T.V. stations. Basic American fairness requires that they be recognized and compensated.

Please disabuse yourselves of the notion so widely cultivated by our opposition that the sales of records directly reflect the number of times the record is played on the air. Even accepting the arrogant premise that radio stations spend 75% of their air time out of eleemosynary concern for the record industry—and in disregard of their own profits—that notion is simply not true. Sales often suffer from over-exposure and overplay on radio. Simply put, why buy a record when you can hear it free?

Put out of your minds too, the canard propagated by the broadcaster that artists grow rich because of record sales.

Present here today are men and women unknown to you. No Sinatras, Diana Ross', Elvis Presleys, Johnny Cash's or Fifth Dimensions—No Perry Comos, Kate Smith's, or Johnny Manns here; but on the records made by those stars and played on radio stations throughout the land, these people present contributed their invaluable services—their performances were heard.

And so that there be a final end to the phony argument being made by the opposition, I am pleased to advise you that the two performing unions have reached a firm agreement under which *all* performers will share equally in the royalty.

For example, if on a Frank Sinatra record there are ten musicians and five background singers, the royalty would be split equally among the sixteen people.

Let me tell you something about the performers here with us today, and they, too, are prepared to answer any questions you may desire to ask of them about the record business.

Mr. David Grupp, a professional drummer who for 62 years has played for symphonies, on network television, recordings, theatres, clubs—even weddings. Many of the thousands of records he has worked on are still being extensively broadcast, and he has never received a penny from the radio stations who profit from his talent.

William Ackerman, born and raised in Nashville, has been making popular, country, and rock and roll recordings since 1960. At least 100 of the more than 5,000 recordings that Bill has made have gone over the million mark. He hears his product played on radio stations all over the country, but he is not paid for or consulted about the broadcast of his talents.

Ralph Mendelson's instrument is viola. He has been with the New York

Philharmonic for twenty-three years. When he joined the orchestra in 1953, its musicians were able to augment their earnings by radio broadcast fees. Today the Philharmonic's music is still used on radio to an even greater extent, but it is recorded and Mr. Mendelson and the other members of the orchestra get nothing.

Louis Nunley of Nashville is probably the most recorded bass singer in the world. He's been a background singer since 1953, with thousands of records to his credit. Over 1500 of these have made the broadcast charts, and more than 200 made the top ten in radio. Lou never received a penny for the broadcast of his records.

Lois Winter has been a successful classical and popular vocalist for twenty-five years. She has performed as a background singer for every kind of recording, literally from A to Z—beginning with the Ames Brothers to Jazz Fiddler Florian Zabach. Remember Mitch Miller's record, "The Yellow Rose of Texas"? Lois, who has a Masters Degree in music theory, got \$16 for the initial session fee, and nothing for the thousands of subsequent radio plays of that record.

Lillian Clark, like Miss Winter, is a working singer living in New York. She began her career with the Clark Sisters, and has sung with such groups as the Skylarks, and The Sentimentalists with Tommy Dorsey. She and Miss Winter together have participated in thousands of New York recording sessions over a span of twenty-five years. Like the others, Miss Clark has received nothing for the radio plays of her work.

Sherlie Matthews is one of the busiest singers in Los Angeles, devoting a major portion of her time and talent to recordings. You hear her voice every morning on the radio as you drive to work, and every night as you drive home. Sherlie is in demand because her talent is unique, and her "sound" is popular. But she is not helped by use of her recordings by broadcasters. Indeed, overexposure may shorten the length of her career. Sherlie and two other ladies whose names you would not recognize were The Supremes, a group whose records were played thousands of times—no payments to Sherlie.

Ron Hicklin, also from Los Angeles, has a list of titles longer than my arm. He's sung with Frank Sinatra, The Partridge Family, The Monkees, Andy Williams. Mr. Hicklin has received and continues to receive the magnificent sum of union scale—\$18 when he began, \$30 now. Nothing for the countless replays for profit on the public airwaves.

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[From The Arts Advocate, June 1975]

GIVING PERFORMERS THEIR JUST ROYALTY

(By Senator Hugh Scott)

For more than 30 years I have advocated and pressed for an idea that always seemed to me to be one of simple justice—the performance royalty. Music has a singular place in our society. It is not only an enormous industry, it is one of the major achievements of American culture.

God endows only a few of us with the real gift to create music, to sing it, and to play it well. The end product is a collaboration of the talents of all three creative individuals, and it is a unique product that can rarely, if ever, be duplicated at a later point, even by those same individuals.

Music can "soothe the savage beast" in man, but up until now it has not softened opposition to the idea of the performance royalty I first introduced as early as the 78th Congress. Time and attitudes of social reform have caught up with the concept, and I am hopeful it will see passage in this Congress.

The present Copyright Law is designed to reward the individual who writes a song each time it is recorded or used. The anomaly though, is that the performers and musicians who actually bring the score to life are not compensated when

their particular rendition is played over radio, television, juke boxes, or background music services. This is somewhat analogous to paying the architect who designs a house and not paying the craftsmen who interpret those plans and build the house.

The "performance royalty" I advocate would require those who use copyrighted sound recordings for profit to pay a performance royalty to those who recorded the music. The amount paid would not be prohibitive or burdensome but would provide a fund out of which performing artists could be compensated when their work generates a profit for others. Amendment to our copyright laws has seemed the best way to achieve this goal.

On January 28, 1943, I introduced H.R. 1570 before the 78th Congress to amend the 1909 Copyright Law and provide for a performance royalty. Subsequently, in the 80th and 82nd Congresses, I sponsored H.R. 1270 and H.R. 2464. Unfortunately there was resistance then as there is today against creating a new proprietary interest, with opponents of the performance royalty asserting that since it was not in the 1909 statute it should not be created today.

The broadcasting industry has been a major opponent of the performance royalty concept. Broadcasters advance the thesis that radio and television stations give free publicity to the artists and the record companies who produce the records. Without their forum and outlet for dissemination to the public, they argue, no market would exist for the recorded music. The argument is unconvincing and misses the point. The real issue to me is whether or not a person who uses his creative talents to produce music is entitled to some compensation from those who take his music and turn over a profit from it. The answer has to be "yes."

It is critical to point out that the concept of rewarding creative efforts is not at all unprecedented in the music sector of the broadcasting industry. Television and radio industries currently pay royalties on a negotiated basis to professional organizations which represent those individuals who compose and arrange music. The dollar amounts now paid to ASCAP, SESAC, and BMI for composers of music, by the radio and television industries, far exceed the royalty for performers suggested in the bill I introduced in March. How anyone can realistically assert that the musical artist's efforts are not on the same creative level as that of the individual who writes the music is something I fail to understand. If one deserves recognition and compensation, then so does the other. Indeed it is the essential genius of performers and musicians that brings the music to life. No less an authority than Erich Leinsdorf found it incomprehensible that they should receive no direct compensation from broadcasters and others for the indispensable programming material they provide.

Outside the United States, the "performance royalty" is widely accepted. Approximately forty countries have established performing rights in recordings, publicly acknowledging the need to encourage and to reward the creativity of the musical artist.

The particular nature of the environment in which the musical artist must survive is one of the reasons a royalty is important. Public tastes and attitudes toward music can change very quickly. As a result, most musical performers tend to have a short productive life. Their major source of compensation is usually the original sale of their recordings.

Some artists produce only one or two songs that are popular and financially successful. After sales of a record have ceased, it will often continue to be played commercially by those who use recorded music for profit. The artist should share in that profit as long as someone is realizing financial gain from his work. The classic example of a song still immensely popular years after major sales have ceased is Bing Crosby's "White Christmas." Over the years, hundreds of versions of the song must have been recorded, but it is the unique Crosby treatment that is most popular each year during the Christmas season. The same is true of certain recordings by the Mills Brothers, or Peggy Lee, as it will be true of Beverly Sills. Should not they continue to share in profits that are still generated long after sales of their recordings have diminished? The principle applies equally to musicians who accompany the recording artist.

During the 93d Congress, I endeavored to educate Members of the Senate about the performance royalty. It was included as Section 114 of the general Copyright Revision Bill, S. 1361. Both the Senate Judiciary Committee and the Subcommittee having jurisdiction over copyright matters approved Section 114 for inclusion in the Copyright Revision Bill that was reported to the Senate floor for consideration. In the interim, strong objections by representatives of the broad-

casting and juke-box industries surfaced in the Senate. When the bill was referred to the Senate Commerce Committee for brief review, the committee recommended that the performance royalty be eliminated from the Copyright Bill.

The Senate decided to vote on S. 1361 in September 1974. There was extended debate on a number of sections in the bill including the performance royalty which was subjected to very persistent efforts by various lobbying groups who wanted it eliminated. Unfortunately, the Senate did strike it from the bill. Certainly, heavily orchestrated opposition to the performance royalty by the section's opponents had some effect on the final outcome.

At the end of the debate I announced my intention to renew the fight in the 94th Congress. On March 7, 1975, I introduced S. 1111 for the performance royalty. Both sides are being asked to appear and make their best analysis of the ramifications of a new proprietary right, I hope by the time the hearings are concluded they will have demonstrated the overwhelming justification and need for a performance royalty.

In past debates, strong, effective lobbying against it managed to have a decisive impact on those who must decide the issue in the Congress. It is imperative that those who do favor the performance royalty now give voice to their position just as strongly and persuasively. Congress should not have to decide the issue again without reasoned debate and exhaustive examination of the interests involved on both sides.

One final point for the public record. The performance royalty is not being proposed in order to tax or place an additional burden on broadcasting and other industries that use recorded music. I favor it not to impose on these interests yet another business expense, and a minimal one at that, but simply because I believe all creative individuals who contribute to the making of our music deserve compensation when their work product is used by others for profit. This is only equity.

[From the Arts Advocate, June 1975]

EDITORIAL—THE GREAT COPYRIGHT FREE-FOR-ALL

This issue of The Arts Advocate devotes a great deal of attention to copyright, an issue politically hot and enormously consequential to the arts. Too few individuals understand just how consequential it really is—and how much the artist stands to lose or gain by Congressional action.

Advocates for the Arts will keep its members informed of the progress of the new copyright bill. We hope you will familiarize yourself with its provisions which are covered at some length on page 4. We will also ask you to take action at critical moments of its passage through the committees and onto the floor of the Senate and the House.

The dollar appropriations for the National Endowment for the Arts often occupy our attention with good reason. However, the dollars at stake for the arts in copyright protection are considerably greater. It is important for us to make sure that the voice of the arts is heard forcefully as the debate gains momentum in the 94th Congress which will surely pass a copyright bill to revise the 1909 Act.

It would be ironically self-defeating if the debate, which the Supreme Court recently failed to enter, were decided in favor of the politically muscular merchants of creative work at the expense of the creators whom the Constitution was specifically trying to protect when it gave Congress, in 1789, the power "... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

Despite the Constitution, a staggering 20 billion copies of published, copyrighted material were run off last year by libraries throughout the United States free for the asking without paying royalties. There was, of course, a charge to use the machines. The exact number of sales this displaces is not calculable. A stack of 20 billion pages of Xerox paper would be taller than Chicago's Sears Tower—almost 7,000 times taller. To be exact, 1,521 miles high.

In February the Supreme Court handed down the anxiously awaited "Dred Scott decision of copyright law." It was no decision at all. The case of Williams and Wilkins v. the U.S. Government, considered by experts of our rickety copyright laws to be the most important copyright case in forty years, now goes back to the 1973 decision by the U.S. Court of Claims which ignores the economic claims of the person who created whatever is worth copyrighting.

The Williams and Wilkins case was significant. It could have been an important guide for the legislation now before Congress. It tested the crucial copyright question of "fair use" by photocopying. It also could have determined whether creators of material—not only authors but composers, playwrights, poets, choreographers, photographers, painters, and sculptors as well—could copyright their work and have it stick. Publishers had the most at stake. Because the National Institutes of Health and the National Library of Medicine duplicated literally tens of thousands of pages from the medical journals published by Williams and Wilkins, the publisher justifiably—or so it would seem—cried foul. With that many copies being cranked out of the duplicating machines of these two government agencies, Williams and Wilkins argued that their income was being substantially threatened. The Court of Claims thought otherwise and ruled in favor of having the government provide copies of journal articles for anyone who wanted them for their own use and against every kind of creator of copyrighted work.

Thus the four judges of the Court of Claims, who held the majority opinion, drove a sizable hole through the protective wall of copyright that the Constitution specifically provided in a time when ideas and their expression were more valued than they are now judged to be. In concluding, they said, "The truth is that this is now pre-eminently a problem for Congress." Clearly, it was not a problem for the U.S. Supreme Court.

The problem is now up to Congress which will have to make hard decisions in an atmosphere of mounting pressures from special interest groups—libraries, publishers, record companies, movie producers, broadcasters, juke-box owners, television stations, background music firms of which Musak is the most ubiquitous, arts organizations, the photocopying industry, performers, unions, universities, and last and unfortunately least in political effectiveness, authors and artists who create the copyrightable work to begin with. The heavyweights in the legislative scrimmage are the broadcasters who do not want to pay any royalties to either the performers or the creators of material. They can also twist a legislative arm or two by insinuating that the next campaign for election may not be covered too well on local radio or TV.

After years of truncating amendments, Senate Bill 22 to revise the 1909 copyright law has been introduced before the 94th Congress by Senator McClellan. The bill covers 18 major features in its various sections. The most progressive feature extends copyright protection through the lifetime of the creator plus 50 years after death. Existing copyrights would automatically be extended to a total of 75 years. The doctrine of fair use is defined for the first time. Last year, the Senate passed a bill that prohibited wholesale copying but permitted libraries to make only one copy of an article requested by an individual. The measure died when the House failed to act. This year's bill revives the issue.

There has been all too little media coverage of copyright to arouse or inform the public, yet the consequences of a new copyright law for the artistic life of the country are profound. In view of the Court's having begged the issue of fair use, there is urgent need for Congress to encourage creative talent and to provide value for its expression through legal protection and economic incentive. In the debate ahead, Advocates for the Arts hopes others will join it in making the strongest possible case in Congress for artists—the source of the arts and the all but forgotten constitutional reason for copyright.

JOHN B. HIGHTOWER,
Chairman, Advocates for the Arts.

Senator SCOTT. Mr. Golodner?

Mr. GOLODNER. My name is Jack Golodner. I am here in behalf of Mr. Andrew Biemiller, legislative director of the AFL-CIO.

Senator SCOTT. Go ahead, Mr. Golodner.

Mr. GOLODNER. I would like to express the apologies of Mr. Biemiller. He intended to be here but unfortunately was required to appear before another congressional committee this morning. I have a letter from him which I would like to insert in the record and then I will read parts of it.

Senator SCOTT. It will be done as we so indicated earlier.

Mr. GOLODNER. The AFL-CIO strongly supports the efforts of America's performing artists to achieve, through our copyright laws, proper recognition of the immense contributions they make to the

culture of our nation and the profits of those who utilize their recorded work for commercial exploitation. S. 1111 would provide such recognition and we urge this committee to approve it.

The Congress and the courts have now clearly established that a sound recording can be the subject of copyright protection. Expert testimony from some of the world's leading artists, the National Endowment for the Arts and the Register of Copyrights support the contention that the artist is, indeed, a creator or author of such recordings and as such is entitled to the consideration provided for in the Constitution.

Just yesterday incidentally before a House Subcommittee, representatives of the broadcast industry, stated that the performing artist is indeed a creator within the terms of the Constitution.

And in recent months even the broadcast industry has echoed the artist's arguments for equity, though it appropriates them solely for its own interests.

On July 8, Mr. Arthur Taylor, president of CBS, told the Senate Subcommittee on Antitrust and Monopoly that he was concerned about cable television because it operates outside the copyright structure, profiting from attractions of free television, but not paying for them. Similarly, America's performing artists and their unions are concerned that the broadcasters and their advertising sponsors, juke box operators and background music organizations are profiting from the commercial use of recordings but are not paying appropriately for them.

S. 22 addresses the problem of the broadcaster vis-a-vis CATV while it ignores the comparable problems of the recording artist.

Such a discriminatory approach is inexplicable and is a serious flaw in the legislation that can only be corrected by adoption of the principles set forth in S. 1111.

The overwhelming number of performers who make possible the recorded works we enjoy and take for granted almost every day of our lives are not famous or wealthy. Quite the contrary, they pursue professions that are among the lowest paid and highly unemployed in the country.

According to the 1970 census, America's musicians earned a median income of \$4,668.

Senator SCOTT. That is what killed the bill before, the argument that this was a bill designed to help the wealthy and that this was a bill for Frank Sinatra and people similarly well known.

Your figure is that the American musician earns a median income of \$4,668. Do you happen to remember what the official poverty level is now?

Mr. KAISER. \$5,000.

Senator SCOTT. Go ahead.

Mr. GOLODNER. Thank you.

While the right to royalties being discussed here will not create new job opportunities it will insure that these people are justly rewarded for their labor and encouraged to continue in their creative professions.

The record buyer, too, would benefit. At present, almost the entire cost for developing, producing and distributing recorded programs, as well as paying the artists, is borne by the millions of individuals who buy records for their own personal enjoyment.

The broadcaster, who turns around and sells these programs for profit, and the commercial sponsor, who uses them as a vehicle to promote his business, contribute no more and sometimes less, than the individual consumer.

We believe this current practice is not only unfair to the artist, who is offered no compensation from the profits earned by his labor, but unfair, as well, to the average record buyer, who now bears the total cost of making recorded programs.

The expropriation of the work of America's performing artists for the benefit of a few profit seeking middlemen is a practice that must end. The AFL-CIO firmly believes that the place of these artists that they be permitted to share in the profits made from their work is wholly justified. We therefore urge this committee to speedily approve S. 1111.

Thank you, Senator.

Senator SCOTT. Thank you very much, Mr. Golodner. Do you have any other observations to make?

Mr. GOLODNER. I think Mr. Biemiller's letter speaks for itself, Senator. Perhaps in the questioning later on, I will have something to add.

[The letter from Mr. Andrew Biemiller, Director, Legislative Department, AFL-CIO, to Senator John L. McClellan, appears as follows:]

AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS,
July 24, 1975.

HON. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Judiciary Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: The AFL-CIO strongly supports the efforts of America's performing artists to achieve, through our copyright laws, proper recognition of the immense contributions they make to the culture of our nation and the profits of those who utilize their recorded work for commercial exploitation. S. 1111 would provide such recognition and we urge this committee to approve it.

The Congress and the courts have now clearly established that a sound recording can be the subject of copyright protection. Expert testimony from some of the world's leading artists, the National Endowment for the Arts and the Register of Copyright support the contention that the artist is, indeed, a creator or "author" of such recordings and, as such, is entitled to the consideration provided for in the Constitution.

And in recent months, even the broadcast industry has echoed the artist's arguments for equity, though it appropriates them solely for its own interests.

On July 8, Mr. Arthur Taylor, President of CBS, told the Senate Subcommittee on Antitrust and Monopoly that he was "concerned" about cable television "because it operates outside the copyright structure, profiting from attractions of free television, but not paying for them." Similarly, America's performing artists and their unions are concerned that the broadcasters and their advertising sponsors, juke box operators and background music organizations are profiting from the commercial use of recordings but are not paying appropriately for them. Mr. Taylor also told the Senate Committee that 85% of what cable television provides its viewers is what is received at no cost from the broadcasters. Because of this, he labeled CATV "a parasitic medium." Similarly, 75% of radio programming consists of recordings without payment to those who made the recorded works possible and we contend that this practice, too, must be condemned.

S. 22 addresses the problem of the broadcaster vis-a-vis CATV while it ignores the comparable problems of the recording artist. Such a discriminatory approach is inexplicable and is a serious flaw in the legislation that can only be corrected by adoption of the principles set forth in S. 1111.

The overwhelming number of performers who make possible the recorded works we enjoy and take for granted almost every day of our lives are not famous or wealthy. Quite the contrary, they pursue professions that are among the lowest paid and highly unemployed in the country. According to the 1970 census, America's musicians earned a median income of \$4,668. The unions representing these professional people indicate that more than 80% of their membership is generally unemployed. Only the few very famous stars achieve notoriety and economic security while the thousands of supporting artists who contribute so much to a recorded performance remain unknown and confront an uncertain future. In part, the severe unemployment they face can be attributed to the fact that their own recordings have been used to displace them from broadcasting, cafes, restaurants, and other places where their work is employed but, thanks to recordings, they themselves are not.

While the right to royalties being discussed here will not create new job opportunities, it will insure that these people are justly rewarded for their labor and encouraged to continue in their creative professions.

The record buyer, too, would benefit. At present, almost the entire cost for developing, producing and distributing recorded programs, as well as paying the artists, is borne by the millions of individuals who buy records for their own personal enjoyment. The broadcaster, who turns around and sells these programs for profit, and the commercial sponsor, who uses them as a vehicle to promote his business, contribute no more, and sometime less, than the individual consumer.

We believe this current practice is not only unfair to the artist, who is offered no compensation from the profits earned by his labor, but unfair, as well, to the average record buyer, who now bears the total cost of making recorded programs.

We have discovered that it comes as a surprise to most people that the performers receive absolutely nothing from the profitable uses made by broadcasters, juke box operators and other purveyors of their recorded work. It is inconceivable to many of them that anyone should be permitted to profit from the work of others without making some form of payment. They are shocked to learn that not one dime of the many millions spent by commercial advertisers, juke box patrons and office building managements to provide musical programming is received by the artists who make the music possible.

In a resolution adopted by the 8th Constitutional Convention of the AFL-CIO, it was pointed out that "through the media of films, television and recordings, the art of the performer can now be carried to huge masses of people. There is a danger that the middle men—those who control the media—will reap all of the profits and the performers will see little, if anything, of the rewards for benefiting such vast audiences. Such a situation must not be allowed to occur. Despite the profound advances which have been made in technology and the changes which they herald, our government has been shockingly lax in bringing the laws of copyright into tune with the times." Therefore, the convention endorsed proposals then pending before Congress "which would assure the right of the performing artist to compensation for the broadcast and commercial exploitation of his recorded work. We believe this is fair", the convention said, "we believe this is just and must not be denied."

The expropriation of the work of America's performing artists for the benefit of a few profit seeking middle men is a practice that must end. The AFL-CIO firmly believes that the plea of these artists that they be permitted to share in the profits made from their work is wholly justified. We, therefore, urge this committee to speedily approve S. 1111.

Sincerely,

ANDREW BIEMILLER,
Director, Legislative Department

Senator SCOTT. Mr. Kaiser, do you want to make a comment at this time?

Mr. KAISER. It is not necessary.

Senator SCOTT. Mr. Hightower?

Mr. HIGHTOWER. I have a prepared statement which I would like to have included in the record of these proceedings.

Senator SCOTT. That will be done.

Mr. HIGHTOWER. Let me introduce myself and I will try to keep my comments brief and extract from the statement I have prepared. I

am John Hightower, chairman of the Advocates for the Arts consisting of a group of some 4,000 citizens throughout the country concerned about the artistic life of the United States.

By definition, this concern includes the rights and role in American society of artists, the source of the arts.

Senator Scott, I think at this point I would like to mention that Mr. Hightower was president of the Associated Councils of the Arts from 1972-75, administrator of the New York State Council on the Arts from 1964-70, and director of the Museum of Modern Art from 1970-72.

Go ahead.

Mr. HIGHTOWER. The organization which I represent here is a program of the Associated Councils of the Arts. It has as its concern artists, particularly the creative artist.

I just underscore that because many of the creative artists who are protected currently by existing copyright law whenever a work is performed feel that there is an obligation, certainly a moral obligation to reward the interpretive artist in terms of royalty arrangements.

I want to commend you, Senator; on your long and determined interest in this provision going back, as you stated to 1941. The debate is frequently clouded by tales of extraordinary sales of pop records and astronomical incomes of the latest and hottest rock group.

These are momentary winners in the royalty sweepstakes. They are very momentary. Their popularity is frequently fleeting. The exceptions are the ones we think of much more often than the rule. The consistent loser is the consumer who buys records, for it is currently up to the consumer to bear the entire cost of the recording industry for its development and its contribution to musical awareness and the livelihood of musical artists in the United States.

The consumer bears the entire development cost for stimulating artistic talent. I think the most eloquent statement I have come across regarding S. 1111 and its hoped for incorporation into the omnibus copyright bill, S. 22, was given by Eric Leinsdorf, of the Boston Symphony Orchestra when he appeared here in 1967 and he stated "when the artist twice in life performs, he is paid twice. If you perform six times you are paid six times. But with a recorded performance, my work can be exhibited as often as the station likes. The cost to the radio station will be the same, nothing. There is something wrong with this. There is no doubt about it. Radio stations will play recordings time and time again over many, many years, long after it is possible to buy that recording in a music shop. For the composer and the publisher, this is not a problem as they continue to benefit from fees. But the performer gets nothing, even in many instances, when it is the performers who create the demand."

This was a comment he made in 1967 before this subcommittee. I suppose it is a little dangerous to relate street wisdom from a ride in from National Airport in a taxi but yesterday morning when I flew down to Washington from Albany, N.Y., I was sitting next to a composer of popular ballads, a young fellow named Evan Allen, probably in his late twenties, early thirties.

He asked me what I was doing in Washington and we began to talk about S. 1111 and its provisions for interpretive artists. He said:

I am a composer, I am considered a creative artist. I would give anything if James Taylor or Barbra Streisand or Joan Baez would perform one of my compositions. If they perform it, they ought always to be paid a royalty. As a creative artist, you can tell the Senate that for me.

Senator SCOTT. I wish, too, that some of these famous names you mention would be activists in the cause of their own colleagues, as they are now in some more obtuse interests. [Laughter.]

Mr. HIGHTOWER. Anyway, I just want to urge the incorporation of S. 1111 into the omnibus copyright bill, S. 22. And finally state that those of us in the arts realize that the consequences of a new copyright law for the artistic life of the country are profound.

I commend you, Senator, for your efforts on behalf of the artistic life of the country.

Senator SCOTT. I thank you and I thank all of the performers who came here from all over the country to be here with us.

[The prepared statement of Mr. John Hightower, chairman, Advocates For The Arts, appears in full as follows:]

STATEMENT OF JOHN HIGHTOWER

Chairman McClellan, members of the committee, my name is John Hightower. I am chairman of Advocates for the Arts, a group of 4,000 citizens throughout the country concerned about the artistic life of the United States. By definition our concern includes the rights and role in our society of artists—the source of the arts. Advocates for the Arts is a program of Associated Councils of the Arts, the national service organization for state and community arts councils; it has a professional membership of 900 organizations and individuals including all of the nation's state arts agencies and commissions.

I am grateful for this opportunity to present our views on H.R. 5345 currently before the House and S. 1111 in the Senate, both of which may eventually be considered amendments to the omnibus copyright bills, H.R. 2223 and S. 22.

The "performance royalty" that is the subject of H.R. 5345 and S. 1111 would compensate both the originator of a work and the interpreter of that work when any material is presented for commercial use on recordings, juke-boxes, radio, television, motion pictures, background music—in all the media. This provision would correct an omission that is now present in the comprehensive copyright legislation that will, we hope, be passed by the 94th Congress.

It would be cruelly ironic if the extensive and long-awaited revision of the 1909 Act were resolved in favor of those individuals and organizations who use creative material for commercial gain and yet simultaneously left out those individuals who make a creative contribution to artistic material. Clearly it was creativity that the Constitution was specifically trying to protect and encourage when it gave to Congress in 1789 the power "... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

WHY THE PERFORMANCE ROYALTY IS IMPORTANT

The arguments for passing a performance royalty are uncomplicated, but as always subject to misinterpretation and self-interest.

Less than 20% of all recorded works are successful—which means they earn more than they cost to record. The other 80% stimulate the growth and expansion not only of the recording industry, but of the nation's artistic life as well. Recording companies have one source of support—the individual consumer.

Under current practices, those who benefit most from the recording industry's development are broadcasters and juke-box owners who pay the least for these benefits which yield them profit.

The debate can be clouded by tales of extraordinary sales of pop records and astronomical incomes of the latest and hottest rock group. These are momentary winners in the royalty sweepstakes. The consistent loser, however, is the consumer who buys individual recordings, for it is currently up to the consumer to bear the entire cost of the recording industry—including a performance royalty

for interpretive artists while broadcasters, back-ground music merchants, and juke-box chains pay nothing.

Regardless of the fleeting popularity of most of our so-called popular artists, the income of pianists, violinists, singers, concert performers, dancers, opera companies, theater groups, and symphony orchestras is affected. These artists and arts organizations should be compensated along with the composer and author every time a work in which they have a part is used commercially.

As Erich Leinsdorf, conductor of the Boston Symphony Orchestra, stated in his testimony for the Senate Copyright hearings in 1967, "When the artist performs twice in live performance, he is paid twice. If you perform six times, you are paid six times; but with a recorded performance my work can be "exhibited" as often as the station likes—and the cost to the radio station will be the same, nothing. There is something wrong about this, there is no doubt about it.

"... Radio stations will play recordings time and time again over many, many years, long after it is possible to buy that recording in a music shop. For the composer and the publisher this is not a problem as they continue to benefit from fees. But the performer gets nothing, even though in most instances it is the performers ... who create the demand.

"And do not forget that ... all sorts of musical performers, particularly singers, have a limited time in their careers. One problem prevailing with singers ... is that they have no way of depreciating themselves in the tax structure. It is not fair for others to be making a profit from performers' talents long after the performers stop receiving any income."

The incorporation of S. 1111 and H.R. 5345 into S. 22 and H.R. 2223 respectively would also allow United States copyright law to conform with the performance royalty clause of most other nations in the Western world.

I also urge that one more glaring inequity be corrected by the Committee. At the present time public broadcasters—radio and television alike—do not compensate composers whenever a work is performed. To compound this injustice technicians, musicians, administrators, and others involved in the operation of public broadcasting are compensated. Only the composer—the creative source of the material—is not. The irony is extended even further as the result of a recent contract with the U.S.S.R. in which the Soviet Union is required to compensate any composer whose work is broadcast in Russia.

On behalf of Advocates for the Arts, I strongly urge the passage of S. 1111 in the Senate and H.R. 5345 in the House.

The consequences of a new copyright law for the artistic life of the country are profound. There is an urgent need for Congress, through a revised copyright law, to encourage creative talent and to provide value for its expression through legal protection and economic incentive.

Senator SCOTT. Mr. Gortikov is president of the Recording Industry Association of America, and has been since 1971. He was formerly an executive of Capitol Industries. We will introduce your full statement at the proper place in the record. Would you proceed to summarize?

Mr. GORTIKOV. Thank you, Senator.

My name is Stanley Gortikov. I am president of the Recording Industry Association of America. Our member companies create and market about 85 percent of the records and tapes sold in the United States.

I am here to support legislation granting rights and royalties to recording musicians, vocalists, and companies for the public performance of sound recordings. To supplement my oral testimony I offer for inclusion in the record a more comprehensive statement.

EXTENDING A BASIC COPYRIGHT PRINCIPLE

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work.

A sound recording is a copyrightable, creative work. It is the product of the creative efforts of vocalists, musicians, composers, and recording

companies. Under the 1909 copyright law only the publisher/composer is paid a performance royalty when a broadcaster plays a record containing the composer's tune.

The rest of the creative team, however, that is, the performing artists and recording company, are paid nothing when the product of their creativity—the sound recording itself—is used for gain by another.

This makes no sense. Congress has already recognized on two separate occasions—in 1971 and again in 1974—that the sound recording bears all the elements of a copyrightable product. Yet as the general revision bill now stands, the sound recording is the only copyrighted creative work for which a royalty will not be paid when it is performed by others.

Significantly the revision bill grants new performance royalties to broadcasters from cable TV. And section 116 grants new performance royalties to composers when sound recordings are played by jukeboxes. The performing artists and recording companies deserve to be included too, for the very same reasons.

BROADCASTERS' OWN ARGUMENTS SUPPORT RECORDING INDUSTRY'S POSITION

Ironically our strongest allies in advocating this principle to Congress are the very same broadcasters who oppose this legislation.

Only last month broadcasting spokesmen appeared before the House Copyright Subcommittee to support this same principle. The broadcasters seek payments from cable television whenever cable uses broadcasters' copyrighted program material for profit.

One of the broadcaster representatives testified:

It is unreasonable and unfair to let (the cable) industry ride on our backs, as it were, to take our product, resell it and not pay us a dime. That offends my sense of the way things ought to work in America.

So we of the recording industry maintain that it is likewise unreasonable and unfair to let the broadcasting industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime.

Broadcasters expect payment when their copyrighted programs are used for another's profit. So do we. Broadcasters aggressively seek copyright payments when they take risks and make investments. We do too. And the recording industry like the broadcasting industry wants equitable payment when its product is used by broadcasters to build audiences, sell commercial time, and build station equity values.

When it is in their economic interest, the broadcasters support the principle of rewarding creators. When it is not in their economic interest, the broadcasters oppose it, as they do now. This is neither logical or fair. We respectfully suggest that Congress not allow the broadcasters to have it both ways.

MOST AIRPLAY DOES NOT HELP SALES OR RECORDINGS

The broadcasters will tell you that they should not have to pay a performance royalty, because airplay helps sell records. They will remind you that record companies actively seek airplay of new recordings.

As you may know, a few record promoters may not have used good sense in seeking airplay, and may have been in violation of the law. Their alleged misdeeds, however, are certainly not representative of the business behavior of the thousands of persons in the recording industry.

Certainly record companies do seek airplay on new recordings, so the broadcaster argument may sound good. It is a hollow and deceptive argument, however, if you examine all the facts, that I now offer.

Fact No. 1: Radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences, advertisers, profits, and station equity.

Fact No. 2: Sound recordings are the mainstay of most radio programming. More than 75 percent of radio program time is devoted to recordings.

Fact No. 3: Most recordings get zero sales benefit from airplay. The vast majority of recordings never get airplay at all. A top hits radio program usually adds only five or six new songs a week to its play list—out of more than 900 new recorded tunes released weekly.

Fact No. 4: More than 75 percent of all recordings released fail to recover their costs. Only about 6 percent make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Over 95 percent of classics lose money.

Fact No. 5: Some 56 percent of all recordings played on the radio are older recordings which do little or nothing to generate more record sales, though they help radio's own goals.

Fact No. 6: Although recording companies want their new product airplayed, they certainly are not out for a free ride. Recording companies today are among the major purchasers of commercial advertising over radio and TV.

In 1972 recording companies paid radio stations over \$32 million for commercial advertising. By way of contrast, the estimated annual yield to recording companies from performance royalties would be about \$5 million, even less in early stages.

Fact No. 7: Broadcasters pay for virtually every other form of programming they employ, except for sound recordings. That includes news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, weather, commentaries, financial, and business services.

Yet they pay nothing for the recordings which furnish 75 percent of their programming.

So only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters.

But the performance royalty principle in the copyright law is not conditioned on who benefits from what. If the principle is valid that one should be compensated for the commercial exploitation of his creative product, then the musicians, vocalists and the recording company are entitled to a performance royalty.

A MODEST FEE SCHEDULE FOR BROADCASTERS

Broadcasters may suggest that they cannot afford to pay a performance royalty. Or that the fee schedule would hurt smaller stations.

The radio and television industries are growing and prosperous. Their revenues, profits, and equity values over the years all have been increasing.

The fee schedule established in this legislation is quite modest, especially when you remember that 75 percent of radio programming is based on sound recordings.

Under this fee schedule 62 percent of all radio stations would pay either nothing or token fees, ranging from 75 cents to \$2 a day. And 38 percent of stations would pay a performance fee of up to 1 percent.

This 1 percent is a small sum indeed compared with the 3.7 percent that the radio stations voluntarily agree to pay publishers and composers through ASCAP, BMI, and SESAC.

Remember too that if a station considers the royalty fee to be unfair, that station has full discretion as to what it broadcasts. It need not play any records. It has the unilateral right to turn to any other programming form of its choice.

PERFORMANCE ROYALTY SHOULD BE INCORPORATED IN COPYRIGHT BILL

We are here also to urge you to make this legislation part of the general copyright revision bill. That is where it was previously. That is where it belongs. As the Senate Judiciary Committee said last year:

There is no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available.

SUMMARY

In conclusion, Mr. Chairman:

1. Vocalists, musicians, and recording companies are entitled to a performance royalty, because a sound recording is a copyrightable, creative work, as Congress and the courts have recognized.

2. There is no valid or logical reason for not granting a performance royalty to the creators of sound recordings. Even the broadcasters support that basic principle, when it is in their economic interests.

3. We believe the time has come to correct the inequity which deprives performing artists and recording companies of income they deserve when their works are used for the profit of others.

This morning Miss Barbara Ringer said would it be not too much to hope that recognizing that they are all part of the same process, the users of copyrighted sound recordings could accept the principle of performance royalties and could sit down with a performer or record maker to work out a reasonable compulsory licensing system.

The alternative no one needs to be told is years more of work beginning in the legislative arena with people working against each other who should be working together for their mutual benefit.

I take her challenge and offer to meet with the National Association of Broadcasters or any other user representatives for this objective. Thank you, Mr. Chairman.

Senator SCOTT. Would you gentlemen give some attention to Miss Ringer's testimony as to the various revisions she suggests regarding possible implementations, suggestions, that might make the legislation more acceptable?

I believe you said the percentage of classic recordings that fail to make a profit is 95 percent?

Mr. GORTIKOV. Yes, sir.

Senator SCOTT. Besides manufacturing the records, what other services are performed by the record company?

Mr. GORTIKOV. The record company offers a variety of services, starting with the basic concept of recording which is a creative act in itself, that is the bringing together of the creative elements, the arrangers, the right artist, the right musicians, the right performers and the right music to create the recording.

The supervision of the recording process also is a creative function. This involves a vast array of employees, different kinds of employees led by a record producer. The actual supervision of the recording itself is an artistic process.

The creative process that goes on through electronic alternatives involved in multitrack recording and editing are infinite.

These new technologies can create new sounds.

Senator SCOTT. In 1940, these electronic interests were minimal compared with today's uses. What has been the impact upon performing artists through the advent of electronic alternatives? Are the performing artists worse off today than they were in 1960? Have their numbers increased? What is the general picture?

Mr. KAISER. I would like to try to answer and to bring up some other aspects of this entire discussion which, I do feel strongly, need emphasis.

First, Senator Scott, I want to supplement the expressions of gratitude already made for the magnificent work you have been doing on behalf of some of the greatest people in the world, performing artists who devote their lives to bringing joy to the rest of us. I think your efforts will ultimately succeed and redound to the benefit of generations still unborn.

I would like to talk quite realistically about what I think is going on. You referred to it obliquely when you indicated you were stopped in the Senate by the broadcasters' myth that we were seeking further to enrich Frank Sinatra. They have stopped us a lot of times, in many areas.

I have been at international conventions seeking solutions to the problems confronting performers throughout the world, where they stopped us. And, in this country they have stopped us in a manner that, I think, will forever be a black mark on the record of the Congress of the United States.

Yesterday, before the House Committee, I heard arguments advanced by the broadcasters which were shocking, if I may use my colleague's language, in the "chutzpah" they revealed; in the cynical regard of some for the processes of democratic government which recently have gone through traumas that have generated so much skepticism among our thinking young.

I heard yesterday, and doubtless you will hear the same today, that the performing artist has no greater friend than the broadcasting industry, that it makes him rich, that without broadcasters there would be no records. They were even taking credit for the high fees earned by some currently successful artists from live concerts. Their argument was almost sufficiently persuasive, should you accept its fantastic premise, to earn for them a royalty on the earnings of live performers. That is no exaggeration. You will, I repeat, hear it yourself today.

You ask what has "crystallized," "what is the difference" since "1960" or "1964?" I say, candidly, the only issue that has crystallized—the only difference—is political.

We don't have the opposition today that we had then. On top of the support of the administration, of interested governmental agencies and of influential groups and persons we did not have then, we now also have the solid support of the record industry. We now have, too, if only sub silentio, the support of the basic copyright proprietors, the composers, and the authors.

This morning the Register of Copyrights, Miss Ringer—who is respected throughout the world as an expert in this field and who adds to her technical expertise a great, humane heart—made one of the most brilliant and incisive statements that could be made on the subject. However, she said one thing with which I must disagree. But let me digress for a moment.

We are none of us children here. We know the direct economic nexus between the broadcasting industry and the newspaper industry. We know, too, inevitable dependence of people seeking public office on the good will of those who own the media of our country. We know, finally, that there is a sizable number of Members of Congress who have financial interests in radio stations. So we are not insensible to the awesome political opposition we face.

Miss Ringer recognized that the broadcasters might not accept her sage advice to sit down with us and work out an agreement that is equitable to all. I think the bill itself reflects an elaborate effort on our part to meet the broadcasters' real problems. It provides for a compulsory license and seeks very modest payments. The bill totally exempts small income stations. It calls for a fractional amount from middle income stations, \$2 a day or less. And the highest income stations would pay no more than 1 percent of net advertising revenues.

Despite our willingness to meet their real problems, Miss Ringer anticipates a gut fight in which the broadcasters pit their political power against that of the AFL-CIO. In that event, she predicts still further delay in consummating the already old legislative effort to revise the basic 1909 statute. So, out of understandable concern for composers and authors who have long been denied a realistic adjustment to the 20th century, she said "there could be no question about priorities" and recommended that you separate our proposal for performance rights from the proposal for general revision.

I disagree and urge, on behalf of performers, that you not accept Miss Ringer's recommendation. We will, of course, give total deference to her technical suggestions—but we can not subscribe to her request for future legislative procedure.

We can not because we think that without riding piggy back on the recognized need of giving relief to the composer we don't have a prayer.

Mr. Chairman, we urge you to exercise your richly deserved influence not to divorce us from the bill for general revision. We need relief even more than do the composers who have prospered on the commercial exploitation of records that has impoverished us.

You put some questions on the income of recording musicians. There are some recording musicians, even anonymous musicians,

who make a very nice income.' But, Senator Scott, there are literally thousands of divinely gifted artists who because of diminishing opportunities to exercise their God-given talents are in other fields.

Many of them are even reduced to the level of practicing law. [Laughter.]

Mr. KAISER. The fact of the matter is, a fact officially recognized and publicized by the Labor Department, that whereas more youngsters are learning, playing and becoming proficient in music than ever before in history, and whereas membership in the American Federation of Musicians is more numerous than ever, work opportunities for professional musicians continuously diminish.

They diminish at the same time that music has become one of the most profitable enterprises in our economy. It is a blatant contradiction. These same broadcasters, who will be telling you how much they do for the performers, are now insulated—by grace of Congress—from the slightest economic pressures available to all other workers in these United States of America to get or hold jobs.

These same broadcasters use 75 percent of their air time selling music but do not hire a single musician. There was a time when many did employ a full-time staff of musicians. But there was much more dough in getting inexpensive records to replace them. And the discharged workers could not, by peaceful picket, protest their loss of jobs to the records they or their fellow musicians made without subjecting themselves to criminal prosecution under the Lea Act, a legislative monstrosity that was enacted in 1946 only because of the political clout of the National Association of Broadcasters.

So, even if it does delay, even if it means a hell of a fight, we urge that the ultimate issue be squarely faced. Is Washington the seat of a democracy reflecting the real interests of all of the people or is it a place where a small group with unbridled political muscle can get anything it wants?

Thank you.

Senator SCOTT. Thank you, Mr. Kaiser. Presently, there is an effort to include this provision in the House bill. If I had the votes in the Senate Judiciary Committee, I might proceed the same way, but we have had some negative experience there. There is considerable likelihood that if it is included in the House bill, the proposal will be held up in conference.

The opponents of the bill will not favor what you gentlemen have said. I would not want to appear as a biased witness myself, but I am the author of the bill. One always supports his own children.

[The prepared statement of Mr. Stanley M. Gortikov, President, Recording Industry Association of America, Inc., appears in full as follows:]

STATEMENT OF MR. STANLEY M. GORTIKOV, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

My name is Stanley M. Gortikov. I am president of the Recording Industry Association of America. Our member companies create and market about 85% of the records and tapes sold in the United States.

I am here to support legislation (S. 1111, H.R. 5345 and companion bills) granting rights and royalties to recording musicians, vocalists, and companies for the public performance of sound recordings. To supplement my oral testimony, I offer for inclusion in the record a comprehensive statement on a performance right for sound recordings.

EXTENDING A BASIC COPYRIGHT PRINCIPLE

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work. The exclusive right of the copyright owner to authorize the public performance of his creative work is known as a "performance right." The compensation he receives for the public performance of his product is a "performance royalty."

A sound recording is a copyrightable, creative work. It is the product of the cooperative, creative efforts of vocalists, musicians, composers, and recording companies. Under the 1909 copyright law, the publisher/composer is paid a performance royalty when a broadcaster plays a record containing the composer's tune. The rest of the creative team, however, the performing artists and recording company, are paid nothing when the product of their creativity—the sound recording itself—is used for gain by another.

This makes no sense. Congress has already recognized on two separate occasions—in 1971 and again in 1974—that the sound recording bears all the elements of a copyrightable product. Yet, as the general revision bill now stands, the sound recording is the only copyrighted creative work for which a royalty will not be paid when it is performed by others.

Significantly, the revision bill grants new performance royalties to broadcasters from cable TV. Even more to the point, Section 116 grants new performance royalties to composers when sound recordings are played by jukeboxes. The performing artists and recording companies deserve to be included too . . . for the very same reasons.

BROADCASTERS' OWN ARGUMENTS SUPPORT RECORDING INDUSTRY'S POSITION

Ironically, our strongest allies in advocating this principle to Congress are the very same broadcasters who oppose this legislation.

Only last month, broadcasting spokesmen appeared before the House Copyright Subcommittee to support this same principle. The broadcasters seek payments from cable television whenever cable uses broadcasters' copyrighted program material for profit.

One of the broadcaster representatives testified: "It is unreasonable and unfair to let (the cable) industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime. That offends my sense of the way things ought to work in America."

We of the recording industry maintain that it is likewise unreasonable and unfair to let the broadcasting industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime.

Broadcasters expect payment when their copyrighted programs are used for another's profit. So do we. Broadcasters aggressively seek copyright payments when they take risks and make investments. We do too. And the recording industry, like the broadcasting industry, wants equitable payment when its product is used by broadcasters to build audiences, sell commercial time, and build station equity values.

Again, the broadcasters themselves said it best, this time the spokesman for the National Association of Broadcasters: "Copyright law . . . must insure that those who profit without paying compensation, of any sort, do so in violation of the intent of the Constitution's framers."

When it is in their economic interest, the broadcasters support the principle of rewarding creators. When it is not in their economic interest, the broadcasters oppose it. This is neither logical nor fair. We respectfully suggest that Congress not allow the broadcasters to have it both ways.

There are those who may tell you these two situations are different. I suggest to you that they are virtually identical. Only the names of the players are different.

MOST AIRPLAY DOES NOT HELP SALES OF RECORDINGS

The broadcasters will tell you that they should not have to pay a performance royalty for the use of sound recordings, because airplay helps sell records. They will remind you that record companies actively seek airplay of new recordings. As you may know, a few record promoters may not have used good sense in seeking airplay, and may have been in violation of the law. Their alleged misdeeds, however, are certainly not representative of the business behavior of the thousands of persons in the recording industry.

Certainly, record companies do seek airplay on new recordings, so the broadcaster argument may sound good. It is a hollow and deceptive argument, however, if you examine all the facts.

In fact, radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences—which attracts advertisers, which leads to profits, and also increases station equity value.

In fact, sound recordings are the mainstay of most radio programming. More than 75% of radio program time is devoted to recordings.

In fact, most recordings get zero sales benefit from airplay. The vast majority of recordings never get airplay at all. A Top-40 radio station usually adds only five or six new songs a week to its play list—out of more than 900 new recorded tunes released weekly.

In fact, more than 75% of all recordings released fail to recover their costs. Only about 6% make any real profits, and they must carry the load for all the rest. Classical recordings fare even worse. Over 95 percent of classics lose money, but they are played on the radio with no compensation to the vocalists, the musicians, or the recording companies.

In fact, some 56% of all recordings played on the radio are those whose meaningful sales' life is over. Over the last few years, we've seen a resurgence of older recordings. Airplay of older recordings drastically cuts exposure opportunities for new records. It does little or nothing to generate more record sales, though it helps radio's own goals.

In fact, although recording companies want their new product airplayed, they certainly are not out for a "free ride." Recording companies today are among the major purchasers of commercial advertising over radio and TV. For example, our most recent data indicate that in 1972, recording companies paid out to radio stations over \$32,000,000 for commercial advertising. And in 1974, the record industry spent nearly \$65,000,000 for television advertising. By way of contrast, the estimated annual yield to recording companies from performance royalties would be about \$5,000,000, even less in early stages.

In fact, broadcasters pay for virtually every other form of programming they employ, except for sound recordings. That includes news services, dramatic shows, disc jockeys, personalities, sports shows, game shows, syndicated features, weather, commentators, financial and business services. Yet, they pay nothing for the recordings which furnish 75% of their programming.

We suggest to you that airplay of sound recordings does more to attract advertising profits to radio stations than it does to sell sound recordings. Only some recordings played over the air benefit performers and companies. But all recordings played over the air benefit the broadcasters—old recordings, new recordings, popular ones, and classics. They all build audiences for the broadcasters and enable them to sell time to advertisers.

But the performance royalty principle in the copyright law is not conditioned on who benefits from what. Publishers and composers benefit from the airplay of sound recordings, too. Yet, no one questions their entitlement to performance royalties. Similarly, cable TV operators claim that they should not have to pay royalties because they benefit the broadcasters by expanding their audience, and hence their advertising revenues. But the broadcasters reject that claim, just as we reject theirs. If the principle is valid that one should be compensated for the commercial exploitation of his creative product, then the musicians, vocalists and the recording company are likewise entitled to a performance royalty.

You may also be interested in the fact that nearly every other Western nation grants a performance right to sound recordings. Unfortunately, American record companies are often denied performance royalties from abroad because foreign record companies do not enjoy reciprocal rights in the United States.

THE CREATIVE ROLE OF RECORDING COMPANIES

Perhaps some of you have thought of a record company as "just a manufacturer," producing tapes and discs and selling them, with the creative work coming only from the performers and composer. This is a mistaken notion.

The recording company plays an essential, highly creative role in the development of a sound recording. I spent 11 years as a record company executive, and served as president of Capitol Records for 3 years. I would like to tell you about the many creative processes performed by the men and women who work for recording companies as they originate sound recordings:

1. They develop the creative concept of the record or album and its basic musical ideas.

2. They choose the tunes and subtly merge the right composition with the right performer.

3. They select the arranger and musicians best suited to the unique musical demands of the recording.

4. They produce the recorded performance and coordinate the delicate interplay between vocalist, arranger, musicians, and recording engineer.

5. They execute the extremely complex processes of multiple-track recording and editing and they ingeniously tap the infinite variables of electronically-influenced sound.

A sound recording, then, is an original creative work, which Congress has concluded is a copyrightable product. The creative contribution of recording companies was recognized by the Senate Judiciary Committee when it stated, in its July 1974 Report on Copyright Law Revision, "The Committee . . . finds that record manufacturers may be regarded as 'authors' since their artistic contribution to the making of a record constitutes original intellectual creation."

The Register of Copyrights wrote, in 1974, "In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute."

Moreover, the U.S. Supreme Court ruled in 1973 that the copyright clause of the Constitution can extend to "recordings of artistic performance."

MULTIPLE INCOME SOURCES ARE VALID FOR ALL

Broadcasters say that performers and record companies should be satisfied with their income from the sales of recordings alone. That should be enough, they say. Broadcasters protest that performance royalties would be an unwarranted additional income source.

But no one is questioning the right of music publishers and composers to separate income from performance royalties as well as mechanical royalties and music sales and foreign royalties and motion picture royalties. And we all acknowledge that book authors and publishers gain separate income from hardbacks, paperbacks, television, motion pictures, foreign rights, and magazine and newspaper reproduction.

In support of the effort to make cable pay copyright fees for use of televised programming, Jack Valenti, president of the Motion Picture Producers Association, acknowledged in Congressional testimony that "a basic concept of copyright includes separate payments for multiple uses." Thus, the broadcasters seek supplemental income from program syndication and from cable TV's new uses of their programs—different payments for different uses. So much for the broadcaster arguments against multiple income.

A MODEST FEE SCHEDULE FOR BROADCASTERS

Broadcasters may also suggest that they cannot afford to pay a performance royalty. Or that the fee schedule would hurt smaller stations. In fact, the payment of a performance royalty by broadcasters for use of sound recordings would be just a tiny drop in a very large bucket.

The radio and television industries are growing and prosperous. Their revenues, profits, and equity values over the years all have been increasing.

The fee schedule established in this legislation is quite modest, especially when you remember that 75% of radio programming is based on sound recordings:

1. Radio stations with net advertising revenues below \$25,000 a year would pay nothing.

2. Radio stations with revenues between \$25,000 and \$100,000 would pay \$250 a year, or about 75 cents a day.

3. For stations between \$100,000 to \$200,000, the annual fee would be only \$750, or about \$2 a day.

4. Stations with revenues of more than \$200,000 would pay a maximum of 1% of their annual net income from advertisers, or some lesser percentage based on their actual usage of recordings.

Under this fee schedule, 62% of all radio stations would pay either nothing, or token fees, ranging from 75 cents to \$2 a day. And 38% of stations, with advertising revenues of more than \$200,000 a year, would pay the full performance fee of up to 1%. This 1% is a small sum indeed compared with the 3.7% that the radio stations voluntarily agree to pay publishers and composers through ASCAP, BMI and SESAC.

For television stations, the fees are more modest, ranging from no payment at all for those with revenues of less than \$1,000,000 a year, to \$1,500 annually for those with revenues of more than \$4,000,000.

On the basis of these fee schedules, the Senate Judiciary Committee in 1974 concluded that, "The committee's analysis of the economics . . . of the broadcasting industry, indicates an ability to pay the royalty fees specified."

Remember, too, that if a station considers its fee to be unfair, that station has full discretion as to what it broadcasts. It need not play any records if it does not want to make the payment. It has the unilateral right to turn to any other programming form of its choice.

CREATION OF MUSIC CULTURAL FUND

While you may think of recording companies most often in terms of the popular music they produce, our companies serve a number of other cultural interests. They record classical music, folk music, ethnic music, country music, and (experimental music, plays, poetry and educational material. They help find and develop young artists, musicians and composers, and bring much-needed income to some symphony orchestras.

The recording companies take seriously the responsibility to provide all types of music on sound recordings, and to foster and encourage the creation, performance and enjoyment of music.

For this reason, some member companies of our Association have suggested creation of a special Recording Industry Music Cultural Fund, to foster serious music projects throughout the United States. This Fund might be financed by the contribution of 5% of the performance royalties received by participating recording companies, if this legislation is enacted. While no procedures have been established, the Fund conceivably might be administered through the National Endowment for the Arts, perhaps in cooperation with States Arts Councils.

PERFORMANCE RIGHT SHOULD BE INCORPORATED IN REVISION BILL

Finally, we urge you to make this legislation part of the general Copyright Revision Bill. That is where it was previously. That is where it belongs. As the Senate Judiciary Committee said last year, there is "no justification for not resolving this issue on the merits at the present time. All relevant and necessary information is available."

SUMMARY

In conclusion:

1. Vocalists, musicians and recording companies are entitled to a performance royalty, because a sound recording is a copyrightable, creative work, as Congress and the courts have recognized.
2. Those who use recordings for their profit should pay for the privilege, as they do for all other copyrighted works.
3. The sound recording is the only creative, copyrighted work performed that does not receive a performance royalty under the Copyright Revision Bill.
4. The broadcasting industry can afford to pay the modest fees established.
5. There is no valid or logical reason for not granting a performance royalty to the creators of sound recordings. Even the broadcasters support that basic principle, when it is in their economic interest.
6. We believe the time has come to correct the inequity which deprives performing artists and recording companies of income they deserve when their works are used for the profit of others.

[The prepared statement of the Recording Industry Association of America, Inc., appears in full as follows:

STATEMENT OF RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC. IN SUPPORT OF A PERFORMANCE RIGHT FOR SOUND RECORDINGS—AS REFLECTED IN S. 1111 AND H.R. 5345

This statement has been prepared by the Recording Industry Association of America. Much of the technical information contained in the statement, identified by footnotes, has been drawn from an objective analysis prepared by the Cambridge Research Institute, an independent management consulting and business research firm.

SUMMARY

It is a traditional copyright concept that one who uses another's creative work for profit must pay the creator of that work. The exclusive right of a copyright owner to authorize the public performance of his creative work is known as a

"performance right." As the general copyright revision bill now stands, sound recordings are the only copyrighted works which can be performed that have not been granted a performance right.

The performance rights bills now pending in the Congress—S. 1111 and H.R. 5345—would remedy this inequity by establishing rights and royalties for the public performance of copyrighted sound recordings. Those bills require broadcasters and others who use sound recordings for their profit to compensate the vocalists, musicians and record companies for the commercial exploitation of their creative efforts. Half of the royalties would go to the performing artists, and the other half would go to the recording companies.

I. EQUITABLE AND ECONOMIC FACTORS OVERWHELMINGLY SUPPORT A PERFORMANCE RIGHT FOR SOUND RECORDINGS

1. *Sound Recordings Account for Three-Fourths of Radio Programming.*—The basic staple of radio programming is recorded music. The Senate Judiciary Committee has noted that 75 percent of commercially available time is used to play sound recordings. Thus, recorded music accounts for roughly three-quarters of stations' advertising revenues—or about \$900 million annually. Yet broadcasters—who must pay for all their other types of programming—pay no copyright royalties to performers or record companies for the prime programming material they use to secure their audiences, revenues and equity values.

2. *Recordings Have Replaced "Live" Performances.*—Broadcasters used to pay for "live" performers, but these artists have actually been replaced by their own recordings. It is inequitable for these recorded performances to be broadcast for profit without any payment being made to the performers.

3. *Composers and Publishers Receive Performance Royalties.*—Under the existing Copyright Law, broadcasters pay the composer and publisher of the song that is played over the air in a sound recording. But the performers and record company whose artistry and skill brought that composition to life in a recorded performance, and whose creative contribution is at least equal to, if not greater than, that of the composer, are paid nothing.

4. *No "Free Ride" for Record Companies.*—The record companies do not get a "free ride" from broadcasters. Radio stations do not use recordings for their programming to do record companies a favor. They use recordings because that is the best way, in their judgment, to build audiences, which attracts advertisers, which leads to profits, and also increases station equity value. Further, about 56% of the records played are "oldies" that enjoy few current sales, if any. Record companies and performers derive little benefit from such air-play, but these recorded performances draw massive listening audiences for broadcasters and, in turn, advertising revenues for the stations. Finally, record companies purchase over \$32 million of advertising time from radio stations annually—about three times the total projected performance royalties under the proposed legislation.

5. *Broadcasting Industry Very Profitable.*—The broadcasting industry is exceedingly healthy. Between 1967 and 1973 (the last year for which data are available), the pre-tax profits of radio stations rose 39 percent, and advertising revenues rose 61 percent.

6. *Royalty Fees Are Very Modest.*—The proposed performance royalty fee is not burdensome. About one-third of the nation's radio stations would pay 68¢ per day. Another third would pay \$2.05 per day. The remaining third of the stations—large stations with more than \$200,000 in annual advertising revenues—would make a modest payment of one percent of net advertising revenues. Thus, even a station earning revenues of \$1 million annually would pay only \$27.40 daily, or \$1.14 per hour to compensate the vocalists, musicians and record companies for the exploitation of their creative efforts. Clearly, the performance royalties are fair and reasonable, particularly in light of the immense advertising revenues that recorded music produces.¹

The rate schedule is as follows:

Revenue	Annual fee
More than \$200,000-----	1% of net advertising revenues.
\$100,000-\$200,000-----	\$750.00
\$25,000-\$100,000-----	\$250.00
\$25,000 and undef-----	None.

¹ A chart detailing, by state, the number of radio stations in each of the royalty rate categories is set forth after page 9, *infra*.

Further, all-news stations or others which do not rely heavily on recorded music would pay only a pro rata share of the performance royalty percentage.

7. *Performance Royalty Consistent with Cable TV Royalties.*—The principle underlying the performance rights bills is identical to that supported by the broadcasters in the general revision bill. Broadcasters assert that cable systems should be required to pay the broadcaster and copyright owners when cable TV picks up the broadcasters' over-the-air signal. In testimony before the House Copyright Subcommittee, they said "it is unreasonable and unfair to let (the cable TV) industry ride on our backs, as it were, to take our product, resell it, and not pay us a dime." But broadcasters, too, are "taking somebody else's product and . . . selling it for profit." In directly parallel fashion, therefore, they should be required to pay the creators of sound recordings when they use that programming material for their profit.

8. *Performance Royalty Recognized Abroad.*—The principle of the bill is not at all radical. Almost all other Western nations require the payment of performance royalties to performers and recording companies. Some of these foreign payments are currently denied to U.S. artists and companies because our country offers no reciprocal right. The primary reason that the principle has not been established here is that the last revision of the copyright laws took place in 1909, long before sound recordings became a significant source of programming materials for commercial exploitation by broadcasters and others.

II. THERE CAN BE NO "CONSTITUTIONAL DOUBT" THAT THE PRODUCTION OF A SOUND RECORDING IS A CREATIVE ACTIVITY DESERVING OF COPYRIGHT PROTECTION.

1. *Copyright Protection Covers Wide Variety of Creative or Intellectual Efforts.*—Copyright protection has never been limited to the "Writings" of "Authors" in the literal words of the Constitution. To the contrary, Congress has granted a copyright to a wide variety of works embodying creative or intellectual effort, including such "Writings" as musical compositions, maps, works of art, drawings or plastic works of a scientific or technical character, photographs, motion pictures, printed and pictorial illustrations, merchandise labels, and so on.

2. *Constitutionality of Copyright for Sound Recordings Upheld.*—Both Congress and the Courts have recognized that sound recordings may be granted copyright protection under the Constitution. In the Anti-piracy Act of 1971, where Congress conferred limited copyright protection upon sound recordings, the Senate Judiciary Committee concluded that "sound recordings are clearly within the scope of 'writings of an author' capable of protection under the Constitution."² The Committee rejected the constitutional objection once again only last year.³

The Courts have expressly upheld the constitutionality of legislation according copyright protection to sound recordings. In *Capitol Records, Inc. v. Mercury Records Corp.*,⁴ the Court said that "there can be no doubt that, under the Constitution, Congress could give to one who performs a . . . musical composition the exclusive right to make and vend phonograph records of that rendition."

A three-judge federal Court has likewise concluded that the activities of sound recording firms "satisfy the requirements of authorship found in the copyright clause. . . ."⁵ The United States Supreme Court, too, has indicated that the copyright clause can extend to "recordings of artistic performances."⁶

Finally, the Copyright Office has advised that it is within Congress' constitutional power to grant copyright protection to sound recordings.⁷

3. *Creativity in Production of Sound Recording.*—Performers and record companies engage in creative activity when they use their artistic skills, talents, instruments and engineering to produce and record a unique arrangement and performance of a musical composition. The Senate Judiciary Committee has found creative copyrightable elements in the "performer whose performance is captured and . . . the record producer responsible for setting up the recording session and electronically processing the sound and compiling and editing them to make the final sound recording."⁸

² S. Rep. No. 92-72, 92d Cong., 1st Sess., pp. 4-5.

³ S. Rep. No. 93-983, 93d Cong., 2d Sess., pp. 139-40.

⁴ 221 F. 2d 656, 657 (2d Cir. 1955).

⁵ *Shaub v. Kleinienst*, 345 F. Supp. 589, 590 (D.D.C. 1972).

⁶ *Goldstein v. California*, 412 U.S. 546, 562 (1973).

⁷ 120 Cong. Rec. S14565 (daily ed. Aug. 8, 1974).

⁸ S. Rep. No. 92-72, 92d Cong., 1st Sess., pp. 4-5.

S. 1111 AND H.R. 5345—NUMBER OF RADIO STATIONS, BY STATE, IN EACH ROYALTY RATE CATEGORY

[Categories are annual revenues of reporting stations, in thousands of dollars]

State	Stations located in SMSA				Stations located in nonmetropolitan area				SMSA/nonmetropolitan total				Total stations reporting
	\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus	\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus	\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus	
Alabama.....	0	14	27	24	0	45	28	3	0	59	55	27	141
Alaska.....	0	2	0	5	2	7	2	2	2	9	2	7	20
Arizona.....	1	5	8	21	1	14	9	3	2	19	17	24	62
Arkansas.....	1	15	14	18	0	28	24	5	1	43	38	13	95
California.....	13	54	71	118	5	23	18	11	18	77	94	129	318
Colorado.....	2	7	11	20	1	10	3	6	3	17	29	26	77
Connecticut.....	0	4	12	25	0	0	1	3	0	4	15	27	46
Delaware.....	0	1	1	5	0	2	1	2	0	2	2	8	12
Florida.....	5	37	39	80	5	29	16	11	10	66	55	91	222
Georgia.....	2	10	23	31	3	47	52	14	5	57	75	45	182
Hawaii.....	0	3	5	9	0	3	2	3	0	6	16	12	25
Idaho.....	1	2	0	3	1	17	16	3	5	19	16	6	46
Illinois.....	6	16	20	56	4	20	36	18	7	36	56	74	173
Indiana.....	4	19	14	34	2	20	20	14	6	39	34	48	127
Iowa.....	1	7	6	18	1	8	28	19	2	15	34	37	88
Kansas.....	0	4	1	13	1	14	18	15	1	18	19	28	66
Kentucky.....	2	7	8	15	5	47	33	11	7	54	41	28	128
Louisiana.....	1	20	11	28	2	24	15	5	3	16	26	33	106
Maine.....	0	3	2	5	0	13	9	7	0	16	11	12	39
Maryland.....	1	5	8	25	2	5	14	6	3	10	22	31	66
Massachusetts.....	3	3	16	43	1	2	9	6	3	5	25	49	83
Michigan.....	1	16	25	59	3	15	23	16	4	31	48	75	158
Minnesota.....	1	8	13	20	1	10	27	18	2	18	40	38	98
Mississippi.....	1	2	4	8	1	51	36	6	2	53	40	14	109
Missouri.....	0	13	8	31	8	38	29	8	8	51	37	39	135
Montana.....	1	0	4	5	2	13	10	9	3	13	14	14	44
Nebraska.....	0	3	1	5	0	14	15	10	1	17	16	15	48
New Hampshire.....	0	0	1	5	1	10	9	5	1	10	10	10	31
New Jersey.....	2	3	11	23	0	3	4	2	2	6	15	25	48
New Mexico.....	1	5	2	4	1	18	21	5	2	23	23	9	57
New York.....	5	26	28	84	1	20	25	17	6	46	53	101	206
Nevada.....	2	5	5	12	1	3	2	0	3	8	7	12	30
North Carolina.....	1	15	27	38	0	53	69	14	2	68	96	52	217
North Dakota.....	0	0	0	3	2	8	9	7	1	8	9	10	29
Ohio.....	4	12	29	73	0	11	16	19	4	23	45	92	164
Oklahoma.....	2	15	7	16	4	22	18	3	6	37	25	18	86
Oregon.....	2	11	6	16	0	22	27	7	3	33	33	92	188
Pennsylvania.....	6	19	39	75	0	22	31	17	6	41	70	92	209

S. 1111 AND H.R. 5345—NUMBER OF RADIO STATIONS, BY STATE, IN EACH ROYALTY RATE CATEGORY—Continued
[Categories are annual revenues of reporting stations, in thousands of dollars]

State	Stations located in SMSA					Stations located in nonmetropolitan area					SMSA/nonmetropolitan total					Total stations reporting
	\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus		\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus		\$0 to \$25	\$25 to \$100	\$100 to \$200	\$200 plus		
Rhode Island.....	0	1	5	9		0	0	2	0		0	1	7	9	17	
South Carolina.....	2	9	16	15		2	20	37	7		2	29	53	22	108	
South Dakota.....	0	1	2	3		2	7	14	4		3	8	16	7	34	
Tennessee.....	1	18	15	39		1	60	29	9		2	78	44	48	172	
Texas.....	7	39	50	99		10	74	46	6		17	113	96	105	331	
Utah.....	2	9	2	10		0	6	5	0		2	15	7	10	34	
Vermont.....	0	0	0	0		0	2	10	7		0	2	10	7	19	
Virginia.....	2	11	23	30		1	26	34	12		3	37	57	42	159	
Washington.....	2	16	18	19		1	28	9	3		3	44	27	27	10	
West Virginia.....	0	4	8	11		1	19	13	10		1	23	21	21	66	
Wisconsin.....	0	11	13	24		1	21	28	22		1	32	41	46	120	
Wyoming.....	0	0	0	0		2	12	14	2		2	12	14	2	39	
Total.....	89	509	659	1,321		83	986	980	417		172	1,495	1,647	1,738	5,052	

Source: FCC Filings by individual stations for 1972.

Note: Under the royalty rate proposed in S. 1111 and H.R. 5345, stations with annual revenues under \$25,000 are exempt; stations with revenues between \$25,000 and \$100,000 pay a flat fee of \$250; stations with revenues between \$100,000 and \$200,000 pay a flat fee of \$750; stations with more than \$200,000 in revenues pay a 1 percent royalty on net advertising receipts.

I. RECORDING COMPANIES AND PERFORMING ARTISTS MERIT A PERFORMANCE ROYALTY

The performer's interpretation of a tune is crucial to its success, and is no less a contribution to the recorded product than is the composer's original lyrics and score.

Many vocalists and musicians are not sustained by royalties from recordings, and their opportunities for live performances have been sharply curtailed by the use of pre-recorded music by broadcasters. A performance royalty would alleviate this situation.

The recording company's creative contribution to a song is very significant; it constitutes original creative activities to which copyright protection can be granted under the Constitution.

The recording company must underwrite severe financial risks in the production of a record; over three-fourths of all records fail to break even financially and the proportion of failures is rising. Yet broadcasting companies profit from the airplay of all records, whether successful or not.

Congress and the Register of Copyrights have noted the merits of a performance royalty for sound recordings. In addition, the constitutionality of vesting a copyright in a sound recording has been upheld by the courts.

The Performer's interpretation of a tune is crucial to its success

Performers' interpretations of tunes and their participation in the actual creation of audible music contributes creatively to the recorded product no less than the actual tunes composers contribute to recordings. A record is a composite of the artistic creativity not only of the composer, but also of the performer and the recording company.⁹

As William Cannon stated:

"There are many factors in the total popularity of a record, and the song itself is many times of minor importance. The most important factors vary in predominance from record to record and any one of them may be of prime importance on a particular recording. These are the artist (singer, instrumentalist, or group) . . . ; the song or tune, but never in its original state; the arranger who embellishes the composition or orchestrates the work and decides how the total musical sound will be arrived at . . . ; the engineers who control acoustics and make electronic alterations in the sound . . . ; and the very important area of exposure and promotion to the public." ¹⁰

The performer can make an important creative contribution to every type of recording. The highly talented jazz musician's original interpretation of a musical composition is often far removed from the original tune set down in lines of notes of the copyrighted work. In classical music, too, there can be considerable variation in the interpretation of a piece. As the Director of the Boston Symphony Orchestra stated:

"Improvisation is one of the earmarks of the performer in music. . . . You're engaged in a creative act whenever you interpret a score. If the performer and the artists were not important, then one recording of Beethoven's Ninth would be sufficient for everyone for all time. Why bother with a second interpretation if it can be no different than the first? Or a third?" ¹¹

The role of the artist can be even greater with popular music. Here it is often the artist's performance as much as—or more than—the composer's tune that makes the recording attractive to both record buyers and radio audiences. The artist as much as the tune have made hits of Barbra Streisand's "People", Frank Sinatra's "My Way", and the like. There must be a hundred versions of "White Christmas", but it is Bing Crosby's special rendition which is continuously popular at Christmas each year. Listeners are eager to hear albums by Andy Williams or the Boston Pops Orchestra, but may be less concerned with any particular song or its composer. In some cases a song which enjoyed little success in one recording becomes a hit when a new recording is made with a different artist or

⁹ The statement of John Desmond Glover before the Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. House of Representatives, 1965, in Part II, Exhibit 4, gives an illustration of the significant creative contribution of the artist and the record manufacturer to the simple melody copyrighted by the composer and publisher in order to transform this simple melody into a commercial product.

¹⁰ Statement of William Cannon owner of the Cannon Coin Machine Co., Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives on H.R. 4347, 1965, pp. 565-566.

¹¹ Statement of Erich Leinsdorf, then Music Director of the Boston Symphony Orchestra, in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597. April 1967, p. 821.

arrangement.¹² Yet, ironically, the performer who makes a composer's tune into a hit, and earns that composer much compensation in the form of mechanical royalties and performance royalties, shares in none of the performance royalties himself. The composer is deservedly paid performance fees for his contribution to a recording used by broadcasters, but the performer, too, is entitled to compensation.

Royalties from record sales do not sustain all performers

Performance fees would provide needed income to those performers who fail to earn substantial royalties from record sales—classical artists, jazz artists, and many popular artists as well. Such performers "never burst into stardom because their appeal is only felt by a narrow segment of the public. They may never have a hit record, although they may have many, many records which are performed time and again for commercial profit."¹³ One performer reports, "he is 'very big in supermarkets and elevators', and everywhere he goes he hears his music being played. Yet he does not receive one dime for these commercial performances."¹⁴

Performance royalties would also bring income to singers no longer collecting substantial royalties from the sale of their hit recordings. Many famous artists, such as Ernie Ford, Mitch Miller, and Pat Boone, sell fewer records today, but airplay of their old records remains heavy. Some radio stations still offer the recorded music of Nat King Cole, and

"* * * everyone benefits but Nat Cole's widow and children. The sponsor attracts an audience with one of the top vocalists of our generation, and the radio stations sells time to the sponsor, the writers and publishers of the songs are paid performance fees for the broadcast of these songs, but Nat Cole's widow and children receive absolutely nothing, nor does the record company that spent 20 years building him as a top recording artist, and owns the masters which are used for these delayed performances."¹⁵

Such performers (and their heirs) should be compensated for the continued commercial exploitation of their endeavors by others.

Performance fees would, of course, also increase the income of those few artists who are presently collecting sizeable artists' royalties from the sales of their recordings. However, the recording careers of even successful performers tend to be distressingly short, and artists, like baseball players, must often maximize income within short periods. "It is not unusual for a performer to find himself in a high tax bracket for a year or so, to be followed by a lifetime of oblivion. The rise of a star is sometimes meteoric, but his popularity often burns out just as quickly."¹⁶ Furthermore, the percentage of performers who are successful for even a brief period is far smaller than is apparent to the general public, which has been fed tales of the fortunes earned by the recording world's fleeting stars. Many artists dream of riches, but few actually attain them. One recording company reported in 1967, that of the performers that they list, only 14 percent had earned enough royalties on sales to defray the expenses normally charged to artists' royalty accounts. Only 188 or so of its 1,300 performers had a profit in their royalty account.¹⁷ Performance fees from broadcasting would supplement the income of at least some of these artists who are receiving meager royalties from sales.

The Minority Report of the Senate Judiciary Committee (in July 1974) expressed concern that, if broadcasters had to pay performance royalties to performers and record makers, "it may well become cheaper for broadcasters to revive studio orchestras and be content to pay the musicians' union scale."¹⁸ Performers certainly would have no objection to such a turn of events, but unfortunately, broadcasters are unlikely to abandon the use of recordings simply because of a new performance royalty which increased their expenses by less than 1%.¹⁹

¹² See "Publishers, Labels Find Success With 'Underexposed' Copyrights", *Record World*, January 25, 1975, p. 4.

¹³ Statement of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 507, April 1967, pp. 542 and 543.

¹⁴ *Ibid.*

¹⁵ Statement of Alan Livingston in *Ibid.*, p. 500.

¹⁶ Statement of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 507, April 1967, p. 821.

¹⁷ Statement of Michael DiSalle in *Ibid.*, p. 832.

¹⁸ U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision (Report No. 93-983), July 8, 1974, p. 223.

¹⁹ See pages 41-42, *infra*.

In conclusion, performers are entitled to compensation for the commercial use of recordings created by their artistic endeavors, just as composers certainly merit the performance fees paid to them for the privilege of using their work in broadcasting for profit.

The recording company's creative contribution to the artistic rendition is very substantial

A recording company makes a two-fold contribution to a recording: the technical manner in which it records a piece of music, and the financial risk it undertakes in producing the recording.

The quality of a recording and its appeal to listeners is very much affected by the way the recording was made: the type of recording equipment and studio facilities used, the electronic effects and recording techniques employed, and the character of the song arrangement and background music selected. As recording techniques have become more sophisticated and as experimentation with electronic effects has grown, the creative contribution of recording companies to their products has increased dramatically, beyond simply the fidelity of a recording.

An article in the Wall Street Journal describes "How Record Producers Use Electronic Gear to Create Big Sellers".²⁰

"Each instrument has its own microphone leading to its own track on the big console's recording tape. (The producers) will cut, slice and dub tracks from the best of the musicians' performances to eliminate flubs by one or two of them, and they'll pick tapes from (the singer's) performances for her best lead vocal. For her harmony parts, they can manipulate the tapes to make her sound like a duo, a trio, a quartet—or even, if necessary, a 16-voice choir. They also will add violin flourishes, called 'sweeteners'. Finally they will blend and distill all this into two stereo record tracks."

The creative contribution of recording companies was recognized by the Senate Committee on the Judiciary when it stated, in its July 1974 Report on Copyright Law Revision, "The Committee . . . finds that record manufacturers may be regarded as 'authors' since their artistic contribution to the making of a record constitutes original intellectual creation."²¹

²⁰ Wall Street Journal, February 12, 1974, p. 1.

²¹ U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision (Report No. 93-883), July 3, 1974, p. 140.

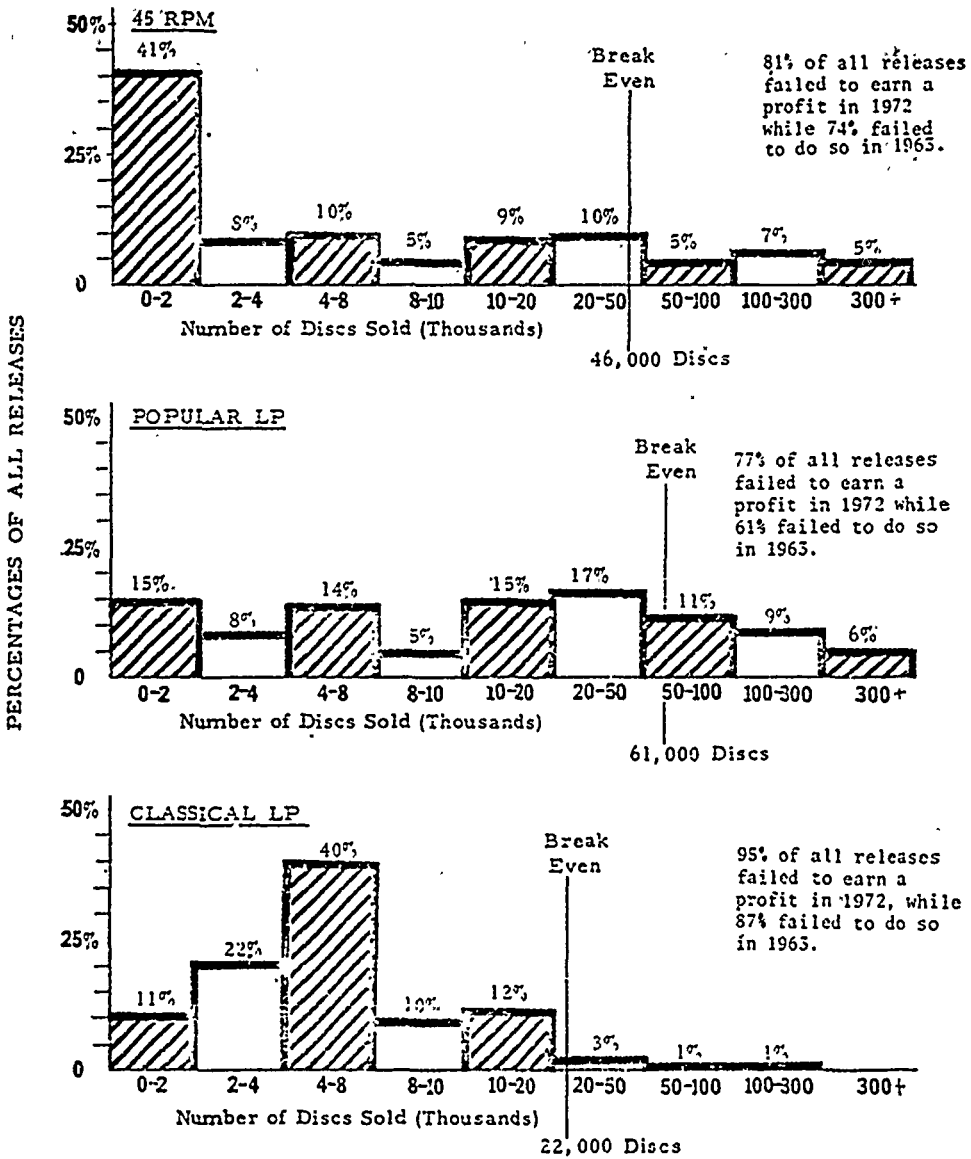


EXHIBIT 1.—Record makers unit sales per release and breakeven points (1972).

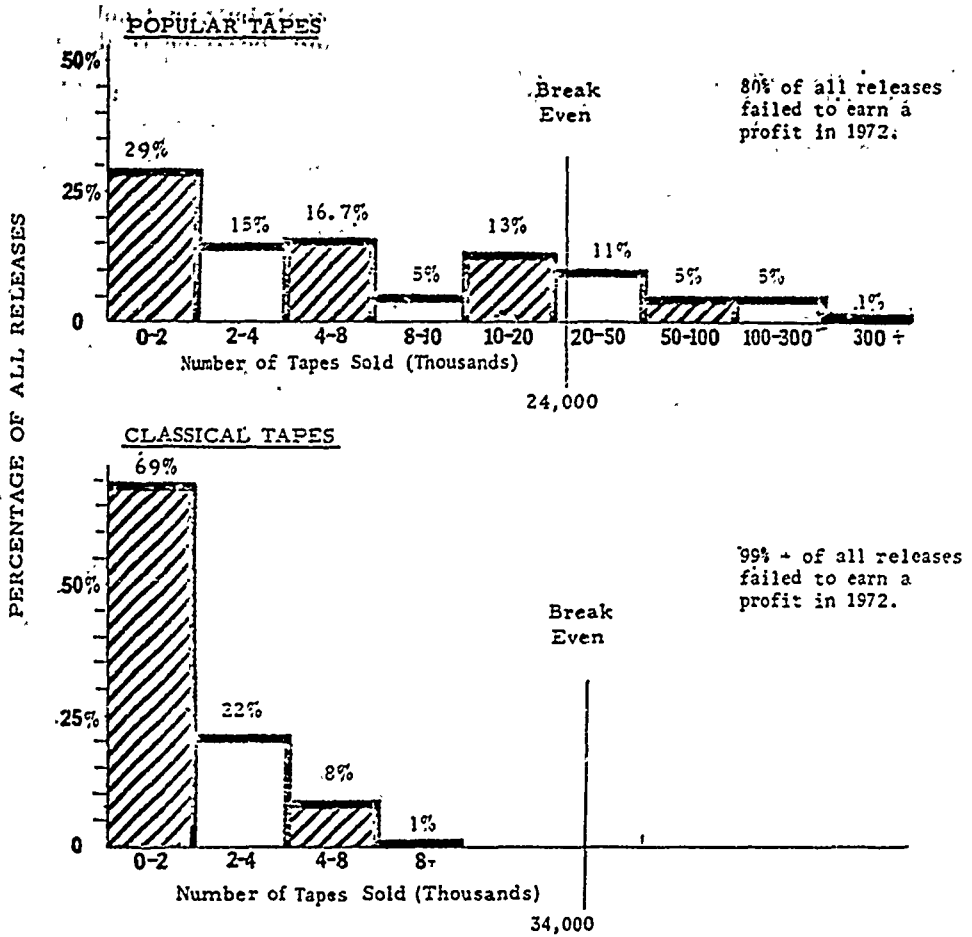


EXHIBIT 1.—Record companies unit sales per release and breakeven points (1972) (continued).

Source: These figures are based on an analysis done by Cambridge Research Institute of a sample of the releases of eight record companies which had 51 percent of the industry's sales in 1972.

The manner in which a piece of music is recorded contributes not only to the music quality but also to the audience lure and, therefore, the commercial value of any recording used by broadcasters. Recording companies also make a contribution by creating a product that can be used by radio and TV stations without hiring performers. Radio's use of recordings builds audiences, sells commercial time, and creates radio profits. Television's use of recordings adds an important dimension to TV programs. For these contributions, recording companies are entitled to compensation by broadcasters.

The recording company must underwrite serious financial risks

In addition, recording companies undertake a substantial financial risk in producing recordings, for the large majority of recordings do not even recover their costs, let alone make a profit, and the proportion of unprofitable recordings is rising. Over 80% of the 45 RPM records and over 75% of the "popular" LP records released do not have sufficient sales to break even. (See Exhibit 1 on the next page.) An even higher proportion, 95%, of classical records are produced and marketed at a loss. It is only reasonable to expect that all who benefit from this risk-taking by the recording companies should compensate them for any commercial value derived from the use of their recordings.

With performance fees, the record producing companies might be encouraged to make more classical and experimental recordings, for which the sales outlook is uncertain. As one recording company president has pointed out,

"If performance fees were to go to the record company and the performer, there would be an end to the record industry's frantic concentration on teenage rock-and-roll in search for fast and large sales and quick return. Presently, the only road to profit for the performer and the record company is the sale of records: therefore, most music must be designed for the specialized record-buying market The generation that listens to the 'good music' stations are, unfortunately, not record buyers Let the record companies be compensated for the use of their records on the air, and they will be financially able to record for the benefit of the large listening audience which wants to hear good recorded music, but which does not necessarily buy records."²²

The commercial risks involved in producing a recording used by broadcasters fall on record companies much more than on publishing companies. If a recording is not a commercial success, the record maker loses. The publishing company and the composer are still paid mechanical fees by the record company whether or not the recording is profitable, and they also get whatever performance royalties accrue from the recording with no additional outlays on their part. To produce a recording costs considerably more than to print sheet music, and recording companies generally expend much more money (and ingenuity) promoting the music than does the publisher. As the President of the American Guild of Authors and Composers has pointed out, the role of the publisher is declining in importance: "Years ago a publisher bought a song, plugged it and got it performed, in eventual hopes of getting a record. Now a song is nothing without a record at the start."²³

At least in part because of this diminishing relative contribution of the publisher to a tune's success, composers more and more often act as their own publishers for promotion purposes and hire a commercial publishing company solely to print and distribute the sheet music. Although we do not question that the publishing corporations are still entitled to the performance fees they currently receive from broadcasters, it is surely true that record makers and performing artists also merit performance fees for their creative contribution and their commercial risk in producing the recordings used so extensively by broadcasters.

The Legal Merits for a Performance Right

In addition to these observations, it is very important to recognize that the authorities agree unanimously that Congress has the power under the Constitution to require that artists and recording companies be paid performance royalties for the commercial use of their recordings. For example:

The Register of Copyrights wrote in July 1974:

"Performing artists contribute original, creative authorship to sound recordings in the same way that the translator of a book creates an independently copyrightable work of authorship. Record producers similarly create an independently

²² Testimony of Alan Livingston in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, Part 2, (March 1967), p. 504.

²³ New York Times, August 8, 1966.

copyrightable work of authorship in the same way that a motion picture producer creates a cinematographic version of a play or novel. In my opinion, the contributions of both performers and record producers are clearly the 'writings of an author' in the constitutional sense, and are as fully worthy of protection as any of the many different kinds of 'derivative works' accorded protection under the Federal copyright statute."²¹

The Supreme Court stated in 1973 that the copyright clause of the Constitution can extend to "recordings of artistic performance."²²

The Senate Judiciary Committee concluded in 1974 that recordings are entitled to full copyright protection:

"Records are 'writings' and performers can be regarded as 'authors' since their contributions amount to original intellectual creations. The committee, likewise, finds that record manufacturers may be regarded as 'authors' since their contribution to the making of a record constitutes original intellectual creations. The committee endorses the conclusion of the Copyright Office that sound recordings 'are just as entitled to protection as motion pictures and photographs'."²³

In conclusion, because of the creative activity involved in recorded performances that is recognized unanimously by the relevant authorities, there is no legal reason why sound recordings should remain the only copyrighted product without performance rights. The contributions of both the performers and the recording companies merit such rights in full.

II. IT IS COMPLETELY EQUITABLE FOR PERFORMING ARTISTS AND RECORDING COMPANIES TO OBTAIN A PERFORMANCE RIGHT

Performers and recording companies are entitled to a performance royalty from broadcasting companies by the very same logic that entitles broadcasters to royalties for the programs retransmitted by CATV operators—i.e., unfair exploitation of another's property for profit.

Broadcasters currently pay less than 3% of their expense dollar for the programming which generates 75% of their revenues. All of this goes to music publishers and composers. None goes to musicians, vocalists and recording companies. This is totally inequitable.

The fact that radio airplay helps the sales of some new records is fundamentally irrelevant to the fairness of granting a performance right.

Most other Western nations now recognize a performance right, and the United States has much to gain by following suit.

The parallel with CATV

There is no stronger argument in support of a performance right for sound recordings than the very same argument which broadcasters are using to urge that cable television companies should pay royalties on the programs they propagate through secondary transmission. The broadcasting companies have sought compensation from CATV for the commercial exploitation of their product without their consent. Performers and recording companies, in requesting performance fees from radio and television broadcasting companies, are seeking precisely the same right. If CATV should pay for the use of programming created by others so broadcasting should pay for the use of recordings created by others. If CATV is required to compensate broadcasting companies, then it is only equitable that broadcasters should be required to compensate record makers in a similar fashion.

Jack Valenti, on behalf of the Motion Picture Association of America, stated on August 1, 1973 at the hearings before the Senate Copyright Subcommittee:

"I agree with Senator Burdick that the crux of this is that the free market place ought to be the determinant as to what a man pays for the product he chooses from a supplier. And, indeed, that is the way cable (television) operates on everything that goes into its system. It buys at a bargain price or price that is set by its suppliers for everything that they use, except one, their copyrighted materials, which is the grist of their business."²⁴

If the word "cable" were changed to "broadcasting companies," this quotation could serve just as well to describe the condition that exists with respect to broad-

²¹ 120 Cong. Rec. S14505 (daily ed. Aug. 8, 1974).

²² *Goldstein v. California*, 412 U.S. 546, 562.

²³ U.S. Senate, Committee on Judiciary, Report on Copyright Law Revision, (Report No. 93-983), July 3, 1974, p. 140.

(Congress granted copyright protection for public performances of dramas in 1856, of musical compositions in 1897, and of motion pictures in 1912.)

²⁴ Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate * * * S. 597, March 1967, p. 251.

caster's use of copyrighted recordings. On the basis of such reasoning, the Senate Judiciary Committee in 1974 stated its belief that "just as cable systems will now be required to pay for the use of copyrighted program material, so should broadcasters be required to make copyright payments under the performance royalty."²⁸

Broadcasters should pay for all of their program materials

The performance royalties currently paid to composers and publishing companies reflect the principle of fair compensation for the use of another's creation. But their creations are only tunes. Without arrangement, performance and all the rest, the tune remains silent, only printed notes on a page. It is creative arrangement, performance, and recording that makes a tune into music, and it is another's music that the broadcasting companies are exploiting without fair compensation.

Fully 75% of radio airtime is devoted to the playing of recordings.²⁹ The payments to composers/publishers for the use of the tunes on these recordings equal only 2.8% of radio station expenses, and no payments are made for the use on the air of the recordings themselves. (See Exhibit 2 on the next page.) Thus broadcasting corporations pay virtually nothing for the bulk of the program material which attracts advertisers.

Such was not always the case. As Red Foley pointed out in hearings before the Senate Subcommittee eight years ago,

"At one time the recording artist could look to 'live' radio as an important source of income and employment. But in the 1950's local radio stations discovered greater profits were available by playing recorded music. Therefore, the 'live' shows virtually died and local stations switched from network programming of 'live' shows to the playing of recorded music Today, instead of 'live' performance opportunities, the artist is in the ironic position of having been displaced by his own recordings, which the radio stations use for profit, without the performer receiving any of the benefit from the profits that his creative performance produces."³⁰

As a result, radio stations can no doubt charge advertising rates that are relatively cheaper than those of other media with which they compete, and which must pay for all their programming material.

We maintain that this situation is inequitable.

²⁸ U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision, (Report No. 93-983), July 8, 1974, p. 141.

²⁹ See study reported by RIAA in the hearings cited above, pp. 487-491.

³⁰ Statement of Red Foley, Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate, April 1967, p. 814.

EXHIBIT 2.—BREAKDOWN OF EXPENSES OF ALL RADIO STATIONS¹

	Amount (in thousands)				Percent of total expenses for all stations			
	1970	1971	1972	1973	1970	1971	1972	1973
Program costs:								
Payroll for program employees.....	208,224	222,078	240,841	260,275	20.9	20.1	19.7	19.3
All other program expenses not itemized below.....	34,522	40,543	42,468	48,837	3.5	3.7	3.5	3.6
Music license fees paid to composers and publishers.....	29,937	32,274	35,616	37,310	3.0	3.0	2.9	2.8
Other performance programming rights.....	11,903	12,950	13,245	14,410	1.2	1.2	1.1	1.1
Cost of outside news services.....	19,933	20,908	23,355	24,930	2.0	1.9	1.9	1.8
Payments to talent not on pay roll.....	8,203	8,443	9,080	9,355	.8	.8	.7	.7
Records and transcriptions.....	5,123	5,678	6,063	6,763	.5	.5	.5	.5
Total program costs.....	317,845	342,876	370,669	401,881	31.8	31.0	30.2	29.8
Nonprogram costs:								
Total technical expenses.....	102,171	107,984	115,638	120,045	10.3	9.8	9.4	8.9
Selling, general, and administrative (including depreciation).....	578,017	655,890	739,046	826,994	57.9	59.2	60.4	61.3
Total Nonprogram costs.....	680,188	763,874	854,684	947,039	68.2	69.0	69.8	70.2
Total broadcast expenses.....	998,034	1,106,750	1,225,354	1,348,920	100.0	100.0	100.00	100.0

¹ These figures are for all AM, AM-FM, and FM stations with revenues of more than \$25,000. They do not include networks, whose figures are broken down somewhat differently. The figures are compiled from those reported in the FCC's annual reports on broadcasting financial data. Last digits may not add to totals, due to rounding.

Record Sales Are Fundamentally Irrelevant to the Fairness of a Performance Royalty

As underscored by the risk analysis in the previous section, the fact that recording companies profit from the sales of recordings should not be used, as some would maintain, as a pretext for preventing them from earning additional legitimate income from the use of these recordings by others to sell broadcasting time, aspirin or automobiles. Composers receive royalties both from the sale of records and from the playing of records over the air. Radio and TV broadcasters record, syndicate and sell for re-use some programs which have already created ad sales for them. Motion pictures are secondarily paid for TV showings. There is no just reason why record producing companies should not also earn income from multiple sources in exactly the same way.

In addition, it has often been argued that radio airplay boosts the sales of sound recordings. It is certainly true that airplay can help the sales of some new releases. However, it is important to keep two points in mind: first, the stations which play exclusively the so-called "Top 40" songs usually start playing them after the songs have become significant sellers in their own right. Not only that, a typical Top-40 radio station rarely adds more than five or six new songs each week to its airplay, but about 135 single records and 75 new albums representing almost 900 tunes are released each week.³¹ Clearly, many of these receive no airplay at all.

Second, most airplay does not produce significant record sales because it is devoted to "oldies" (i.e., records that have been out on the market for a number of years and are long past their period of significant sales), and the vast majority of record sales occur on albums which have been on the market for less than 90 days.

This conclusion is based on the following facts. In 1967, 70% of Capitol Records' total sales were accounted for by records which had been on the market for less than 90 days.³² A 1975 analysis on one company's record catalogue listing all recordings released in the last two years showed that 75% of all sales of records on the list were sales of recordings released in the previous 90 days. A further survey of five record companies indicated that, on the average, 70% of their 1974 sales were of recordings released that year. Clearly, a newly-released record is a rapidly wasting asset.

At the same time, as can be seen in Exhibit 3 on the next page, an analysis of the advertising revenues earned by radio stations in six major markets showed that, of the revenues earned by the playing of music, 55.8% were earned by the playing of "oldies". Even though these are minor sales items for recording companies, old recordings as well as new ones lure radio audiences and enable stations to make sales to advertisers. And yet, no compensation is ever paid for the artistry, know-how, enterprise and investment that went into creating that vast repertory which has unequalled commercial value for radio and television companies.

In addition, frequent airplay of some popular songs can actually decrease sales due to overexposure. In the industry such a song is called a "turntable hit". "This means the tune was a hit in terms of the number of times it was played on the air, but the performer does not receive royalties for broadcast plays, and the substantial sales he counted upon never materialized."³³ Another way airplay can hurt a recording's sales is by making it possible for listeners to make a copy on tape without buying the recording.³⁴

³¹ A tune may be released on both a single and an album, so the statistics on record releases give a slightly overstated picture of the number of tunes released.

³² Testimony of Alan Livingston in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, April 1967, p. 497.

³³ See testimony of Stan Kenton in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. Senate . . . S. 597, March 1967, p. 540.

³⁴ Testimony of Michael DiSalle in *ibid.*, p. 832.

EXHIBIT 3

ANALYSIS OF MUSIC PROGRAMING IN STATIONS IN 6 MAJOR MARKETS

Market and number of music stations in market (news and foreign language stations omitted)	Estimated daily music revenue assuming 5 advertising minutes per hour ¹	Revenue due to "oldies" programing as reported by each station in early 1975, aggregated by market
Baltimore Md. (22 stations).....	\$48,683	28,018
Houston Tex. (23 stations).....	65,138	30,791
Los Angeles, Calif. (48 stations).....	176,407	102,197
New York, N.Y. (25 stations).....	156,983	91,682
Salt Lake City, Utah (20 stations).....	31,293	15,955
Washington, D.C. (29 stations).....	95,029	51,227
Total.....	573,533	\$ 319,870

¹ Minute rate times 5 times airplay hours per day times 0.75. (The assumption of 5 advertising minutes per hour is not crucial to the result. Multiplying by 0.75 takes into account the fact that $\frac{3}{4}$ of programing is recorded music.)

² Composite share of all revenues due to oldies equals \$319,870/\$573,533 equals 55.8 percent.

Source: Survey conducted by Cambridge Research Institute.

Finally, if radio airplay did contribute significantly to record sales, there would be no need for the recording companies to spend the vast sums they do on record advertising. Billboard magazine reported in May 1975 that record advertising on television soared to \$65 million in 1974, including cooperative ads by retailers. The data on radio advertising expenditures developed from a survey by the Cambridge Research Institute indicates that in 1972 the comparable total was on the order of \$32 million.³⁵ One reason for this is again that few tunes receive any airplay at all.

All of these observations notwithstanding, whether recording companies or performers benefit in any way from the broadcasting of their products is a subordinate argument. As Senator Tunney pointed out in 1974,

"The real issue is whether or not a person who uses creative talents should receive compensation from someone else who takes them and profits from them. More than 75% of the airtime during which advertising is sold is spent playing music. I believe if the artist's creative efforts are used in this way he is entitled to some compensation."³⁶

A Performance Royalty Should Be Paid in the United States as It Is in Most Other Western Nations

An "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations" was adopted in 1961. This convention, known as the Rome convention, stated in Article 12:

"If a phonogram published for commercial purposes, or a reproduction of such phonogram is used directly for broadcasting or for any communication to the

³⁵ The survey conducted for RIAA by the Cambridge Research Institute is based on reporting by seven companies representing 42.3 percent of industry sales, with respect to purchases of non-co-op radio time; as to co-op radio time, six companies representing 40.7 percent of industry sales reported. The total recording industry figure of \$32 million was grossed up to 100 percent of the industry from the foregoing bases. See also, Billboard May 10, 1975, and May 15, 1975, p. 1. Billboard has estimated that radio advertising including co-op in 1974 was \$3.5 million, a figure that obviously is inaccurate.

³⁶ U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision, (Report No. 92-983), July 3, 1974, p. 222.

public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both."

So far the convention has been ratified by fifteen countries, including the United Kingdom, West Germany, Austria, Denmark, and Sweden.

Although the details of the laws vary, Japan and most countries in Europe also have domestic laws specifying that performance fees should be paid to recording companies and/or performers for the use of recordings in broadcasts, and arrangements are made on either a legal or a voluntary basis for the two groups to share the performance fees collected. (See Exhibit 4 on the next page.) In Japan, the four Scandinavian countries, Austria, and Czechoslovakia, the law grants performing rights to both record producers and performers. In the United Kingdom, Ireland, Spain, and Italy, the law grants performing rights to record producers alone, but the record producers have sharing arrangements on a voluntary basis with performers. In West Germany, on the other hand, a law gives performing rights to performers, with a share to be paid producers. In France, Belgium, and The Netherlands, the law does not specifically recognize performance rights in records, but broadcasting organizations nevertheless pay fees to the record producers.

EXHIBIT 4

COUNTRIES IN WHICH THE LAW GRANTS PERFORMANCE RIGHTS TO PERFORMERS AND OR RECORD MAKERS

Australia, Austria, Barbados, Brazil, Chile, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Fiji, Finland, East Germany, West Germany, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Mexico, New Zealand, Norway, Pakistan, Paraguay, Philippines, Poland, Roumania, Sierra Leone, Singapore, Spain, Sri Lanka, Sweden, Trinidad and Tobago, and the United Kingdom.

[NOTE: In some countries, such as France, Belgium, and the Netherlands, the law does not specifically recognize performance rights in records, but broadcasting organizations nevertheless pay fees to record producers.]

Source: International Producers of Phonograms and Videograms, "General Survey on the Legal Protection of Sound Recordings As At December 31, 1974."

Canada, moving in a contrary direction to the rest of the world, recently abandoned performance fees for performers and record companies. However, this action was taken primarily because most payments were remitted to United States recording artists and United States record makers, with no reciprocity for Canadian artists in the United States. This explanation was documented by the statement of The Honorable Ron Basford, the Minister responsible for the introduction and passage of the Government Bill, at the commencement of the hearings before the Standing Senate Committee on Banking, Trade and Commerce in the Canadian Parliament in December, 1971:

"May I be permitted, Mr. Chairman, to draw your attention and that of honourable senators to what I view as certain important considerations. I shall be very brief and will then subject myself to whatever questioning that honourable senators have. As has been made clear in evidence before you, 95 per cent of the record manufacturers, through this performing right society known as Sound Recording Licensees (SRL) Limited, are subsidiaries of, or associated with, foreign firms, in very large measure American firms. The American principals of the SRL group do not have the right in the United States that their Canadian subsidiaries are now demanding and trying to exercise in Canada through the tariff that was accorded to them in the recent decision of the Copyright Appeal Board.

"What is not available to the record manufacturers in the United States is apparently regarded as necessary in Canada. What is not available to the foreign parents is claimed in Canada. Surely this is an anomalous position for us in Canada to find ourselves in, and surely it is an inequitable one from the point of view of Canadian users of records."

In addition, United States record producers are often denied performance royalties from abroad because foreign record companies do not enjoy reciprocal rights in this country.³⁷

"For example, in Denmark, payment is made only for the performance of recordings originating in Denmark itself or in a country which grants reciprocal rights to recordings of Danish origin. As a result, no payment is made for the use of U.S. recordings there."³⁸

^{37 38} Statement by Sidney Diamond in Hearings Before the Subcommittee on Patents, Trademarks, and Copyrights, of the Committee on the Judiciary, U.S. Senate, Part 2, March 1967, p. 508.

If this country followed the precedent of others in paying performance fees to record producers and performers, more performance fees would flow into this country than would flow out. In 1974, for example, ASCAP received from abroad \$12.3 million in performance fees, but it paid out to foreign performing rights societies only \$5.9 million. Were the performance right enacted, the performance fees paid to U.S. artists and recording companies would contribute positively to the balance of international payments.

III. THE IMPACT OF A PERFORMANCE ROYALTY UPON BROADCASTERS, ADVERTISERS, AND CONSUMERS WOULD BE SLIGHT

Economic analysis indicates an ability on the part of broadcasting companies to pay the proposed performance royalty. A growing amount of airtime which radio has been able to sell to advertisers has combined with an expanding audience for radio programs to produce sharply rising radio revenues and profits. Even if the proposed performance fee were not covered by either higher ad sales or higher ad prices, the fee would increase total radio expenses by less than 1%, and amount to 8%-10% of radio's pretax profits (for radio stations with revenues of \$25,000 or more).

If instead, radio stations elected to pass forward the expense of a performance royalty to their advertising sponsors, the increase would be minimal compared with advertising rate increases posted in recent years. In addition, radio's advertising advantages are such that a 1% (maximum) increase in advertising rates is very unlikely to scare away advertisers.

The proposed performance royalty for television stations would amount to a mere 0.07% of 1973 pre-tax television profits. Television's return on sales would not be affected.

If advertisers also passed forward the costs of a performance royalty for recording companies and performing artists, the impact on wholesalers and consumers would be scarcely perceptible.

Broadcasters Have the Ability to Pay a Performance Royalty

Radio industry trends indicate the industry can cope easily with the added expense of a performance royalty paid to performers and recording companies. Radio is a growing and prosperous industry, as reflected by the following trends based on 1973 data, the last year for which FCC statistics are available.

Radio is a larger industry than the recording industry: in 1973, net radio revenues were \$1.5 billion while net sales by the recording companies were about \$1 billion.³⁹ The profitability of the two industries has been about the same in recent years even though recording industry profits are notably volatile: radio pre-tax profits were 7.4% of net revenues in 1973, and recording company pre-tax profits were 7.8% of net sales.

Radio advertising revenues have grown even more rapidly than total advertising revenues for all media. While total advertising revenues grew 49% between 1967 and 1973, radio advertising revenues grew over 61% during those years.⁴⁰ (See Exhibit 5 on the next page.) The Commerce Department projects that radio revenues will grow to \$2.7 billion by 1980, an increase of 60% over the 1973 figure.⁴¹

Total radio pre-tax profits rose 33% between 1967 and 1973, the last year for which data is available, to a level of \$112.4 million.⁴² (See Exhibit 5.)

The number of radio stations grew 20% between 1967 and 1973.⁴³ So many new radio stations would not be opening up if the financial future of the radio industry were not considered to be attractive.

³⁹ Retail sales of recordings at list prices are reported in Billboard International Buyers Guide, September 14, 1974, as about \$2 billion. Since most recordings are sold at a discount, actual retail sales are about 80% of the Billboard figure. The prices at which recording companies sell records and tapes to distributors average about 50% of list prices.

⁴⁰ According to Advertising Age's Research Department, total advertising revenues rose from \$16.9 billion in 1967 to \$25.1 billion in 1973, while radio advertising revenues rose from \$1.05 billion in 1967 to \$1.7 billion in 1973.

⁴¹ "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," Broadcasting, November 11, 1974, p. 48.

⁴² FCC annual reports on AM-FM Broadcast Financial Data indicate that radio's pre-tax profits rose from \$80.9 million in 1967 to \$112.4 million in 1973.

⁴³ According to the FCC's annual reports on AM-FM Broadcast Financial Data, the number of radio stations rose from 4,481 in 1967 to 5,353 in 1973.

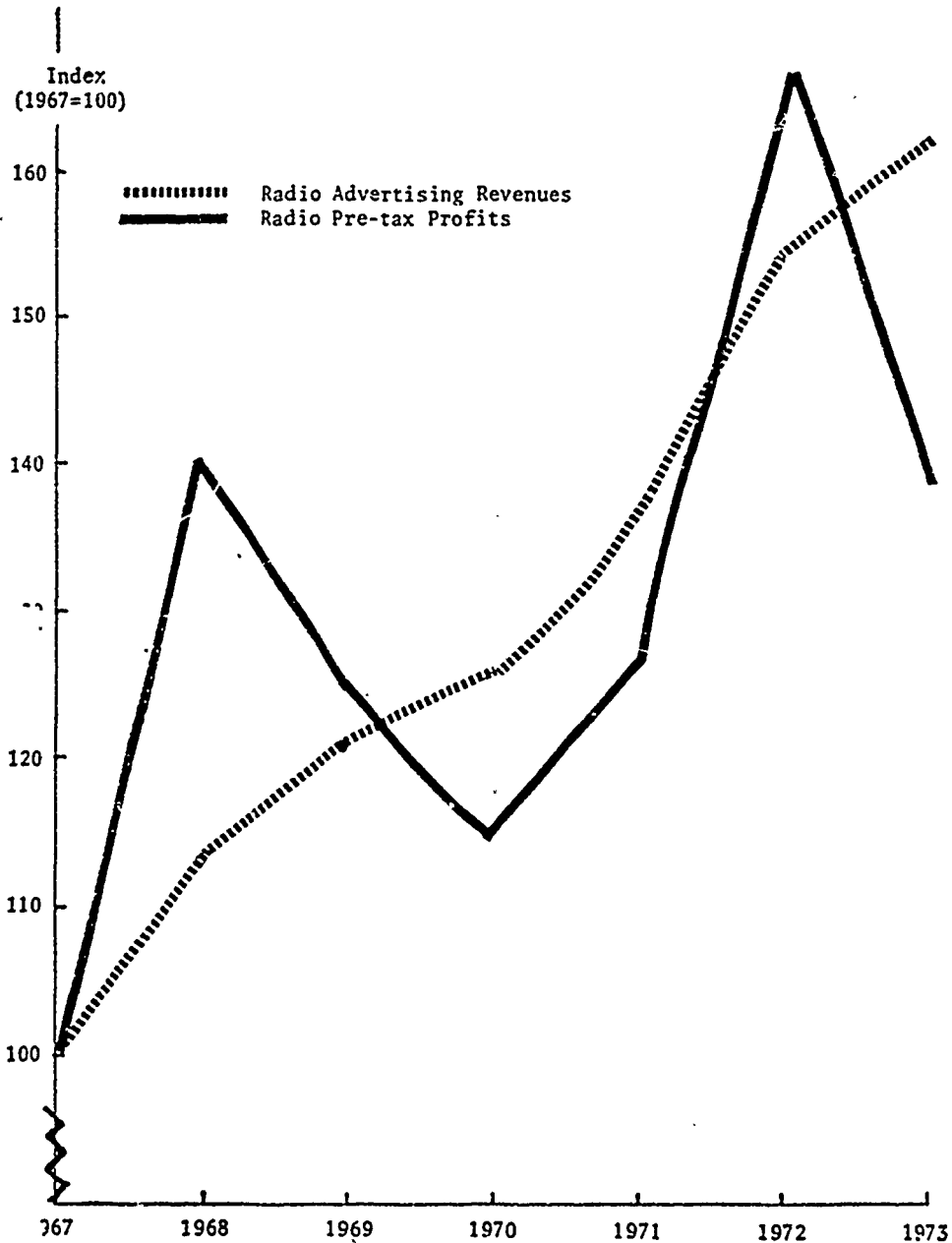


EXHIBIT 5.—Radio revenues and pretax profits 1967–1973.

Sources: FCC annual reports on AM–FM broadcast financial data.
Research department of Advertising Age.

The prices at which existing radio stations are sold have shot up. For example: "Back in 1970 . . . the price in Cleveland for a 'raw FM license' (meaning any given facility regardless of its particular pro and con attributes) was \$70,000. Now, reports a Midwest broker, it would go for \$1.2 million. Four years ago a raw facility in Miami would sell for about \$500,000. Today you couldn't pick it up for less than \$1 million."⁴⁴

⁴⁴ "One Sure Indicator of FM Growth: High Price Tags on Stations," *Broadcasting*, October 7, 1974, p. 50.

Prices for AM stations are rising, too. The average transaction price per trade of all radio stations rose from \$54,674 in 1954 to \$188,829 in 1967 to \$464,820 in 1971.⁴⁵ Thus, between 1967 and 1971 the average transaction price rose 146% while the Consumer Price Index rose 21% during those years, and radio station revenues advanced 38%. Apparently investors consider that radio has good future prospects, for just as they might accord a high price/earnings ratio to a desirable common stock, they are valuing radio stations far in advance of their actual revenue and earnings growth.

Radio has been able to sell increasing amounts of time to advertisers despite the rise in its advertising prices. This is reflected in the fact that radio advertising revenues have been rising more rapidly than the prices radio charges advertisers. For example, while radio spot ad prices rose 19% between 1967 and 1973, radio spot ad revenues rose over 21% during that period.⁴⁶ (Radio spot advertising is national advertising which permits the advertiser to select the radio markets to which his message will be beamed. Spot advertising is distinguished from network advertising, which is also national advertising but which restricts the advertiser to network-affiliated stations.)

Radio has been able to increase its audience considerably. Between 1968 and 1973, the audience for radio spot ads grew 32%.⁴⁷ Because of the substantial growth in radio audiences, the cost of radio spot ads/1,000 listeners grew only 7% between 1967 and 1973, even though an advertiser's cost/minute of radio spot ads went up 19%.⁴⁸

The audience for radio encompasses almost the entire population of the United States. Of all adults, 96% are reached by radio at some time during the week. Each adult on the average listened to radio 3 hours and 22 minutes per day in 1974—a dramatic increase from the 2 hours and 31 minutes the average adult devoted to radio in 1969. The average time adults listened to radio in 1974 is only slightly less than the comparable television figure: 3 hours and 48 minutes, and television had only a three minute increase between 1969 and 1974. Of all U.S. homes, 98.6% had at least one radio in working order, and 95% of all cars are equipped with radios. Cars with radios have the radio on 62.5% of driving time.⁴⁹

It is interesting to compare this prosperity of the radio industry with the proposed fees spelled out in S. 1111-H.R. 5345, the text of which is similar to that of Section 114 of the Copyright Bill passed by the Senate Judiciary Committee in July, 1974. The provisions require broadcasting corporations to pay performance fees to recording artists and recording companies. These bills favor smaller radio stations by exempting them from the proposed performance royalty. Stations with annual revenues of less than \$25,000 (2.6% of stations in 1973) would be completely exempt from the performance royalty.

Stations with revenues between \$25,000 and \$100,000 (26.5% of all stations in 1973) would pay only a token performance royalty of \$250 a year. Stations with revenues between \$100,000 and \$200,000 (33% of all stations in 1973) would pay a performance royalty of just \$750 a year. Only the remaining 38% of stations, which have revenues above \$200,000 a year, would pay the full performance fee equal to 1% of their net receipts from advertisers, and this fee would be reduced for those stations using less than the usual amount of recordings. Thus, 62% of all radio stations would be exempt or pay only a token performance right to performers and recording companies, and only the large stations would pay the full performance right of 1%.

On the basis of this fee schedule, the Senate Judiciary Committee one year ago concluded that, "The committee's analysis of the economics . . . of the broadcasting industry, indicates an ability to pay the royalty fees specified in Section 114."⁵⁰

⁴⁵ Using statistics in the 1973 Broadcasting Yearbook, the average transaction price for radio stations only (not combined radio-TV stations) was derived from the total dollar value of FCC-approved transactions, divided by the number of radio stations changing hands, including both majority and minority transactions.

⁴⁶ Radio spot ad revenues rose from \$813.5 million in 1967 to \$880 million in 1973, according to Advertising Age's Research Department. Radio spot ad prices rose 19% according to "1974-75 Cost Trends," Media Decisions, August 1974, p. 45.

⁴⁷ Broadcasting in 1975: Shipshape in a Shaky Economy," Broadcasting, January 13, 1975, p. 35.

⁴⁸ "1974-75 Cost Trends," Media Decisions, August 1974, p. 45.

⁴⁹ Radio Advertising Bureau, Radio Facts: Pocket Piece, 1975 and 1970 editions.

⁵⁰ U.S. Senate, Committee on the Judiciary, Report on Copyright Law Revision, (Report No. 93-988), July 8, 1974, p. 140.

EXHIBIT 6

PERFORMANCE ROYALTIES THAT WOULD BE PAID BY RADIO STATIONS UNDER S. 1111

- [Dollar amounts in thousands]

Revenue category	Number of AM, AM/FM stations in this revenue category in 1973 ¹	AM, AM/FM estimated performance royalty (based on 1973 revenues) ²	Estimated number of FM stations in this revenue category in 1973 ³	Estimated number of stations of all types in this revenue category in 1973	All stations' estimated performance royalty (based on 1973 revenues) ²
Less than \$25,000.....	36	0	98	134	0
\$25,000 to \$100,000.....	996	\$202-\$239	367	1,363	\$270-\$327
\$100,000 to \$200,000.....	1,420	853-1,022	255	1,675	1,018-1,206
Over \$200,000.....	1,761	8,209-9,729	204	1,965	8,769-10,393
Total.....	4,213		924	5,137	
Total for stations with revenues of \$25,000 or more.....	4,177	9,274-10,990	826	5,003	10,063-11,926

¹ These figures are based on 1973 FCC statistics for those radio stations operating a full year.

² Formula for the performance royalty in both S. 1111 and in sec. 114 of Copyright bill passed by Senate Judiciary Committee in July 1974. Stations with revenues from \$25,000 to \$100,000 would pay a flat royalty of \$250, stations with revenues from \$100,000 to \$200,000 would pay a flat royalty of \$750, but the fees would average only about 81 to 96 percent of this because of fee reductions granted stations using less than the usual amount of recorded music. (See exhibit 11-2 on the percentage of stations which are music stations.) Stations with revenues above \$200,000 would pay a royalty equal to 1 percent of their "net sponsor receipts". If allowance is made for stations devoting less than average air play to recorded music, the performance royalty would average perhaps 0.81 percent to 0.96 percent of "net sponsor receipts". AM, AM/FM stations in this revenue category had 77 percent of all AM, AM/FM stations expenses in 1973 and thus, we estimate, earned 77 percent of the \$1,316,117,000 collected in "net sponsor receipts" by all AM, AM/FM stations in 1973. No data are available on total net revenues earned by FM stations with revenues above \$200,000. We estimate that 24.7 percent of the FM stations with revenues above \$25,000 fall in this category, while 42 percent of AM, AM/FM stations are known to do so. We have also estimated that AM, AM/FM stations with revenues over \$200,000 earn 77 percent of total AM, AM/FM revenues. We, therefore, estimate that FM stations with revenues over \$200,000 earned 45 percent of all FM revenues (24.7 percent divided by 42 percent times 77 percent) or \$69,127,000 in 1973.

³ 1973 FCC data indicate the distribution among various revenue categories of independent FM stations but do not do so for FM stations affiliated with an AM station but reporting separately to the FCC (and therefore not included in the statistics for AM, AM/FM stations). We have assumed that the 2 types of FM stations have the same distribution among the revenue categories. The number of FM stations with revenues under \$25,000 was reported to be 98 in 1973. Therefore, in this revenue category the number of stations is correct and is not an estimate.

Source: Analysis made by Cambridge Research Institute based on the FCC's "AM-FM Broadcasting Financial Data," 1973. (The latest available statistics.)

Indeed, as can be seen in Exhibit 6 on the next page, an estimate can be made (based on 1973 radio revenues) that the total performance fees paid by radio to performers and recording companies under S. 1111-H.R. 5345 would have been between \$10 and \$12 million. Referring once again to Exhibit 2, (the exhibit in Section II on program costs) two things should be noted: first of all, a performance fee expense of, say, \$11 million would have added a scant 2.7% to total program costs in 1973. Secondly, the proportion of all expense dollars going into program costs has been declining, while that of administrative salaries, general overhead, and selling expenses has been rising. If the proposed performance fees were required, thereby adding about \$11 million to program costs, the proportion of all broadcast expenses going toward programming would still be only 30.3%, less than it was in 1970. Hence, there would be no significant change in broadcasters' cost structures. All in all, the proposed performance fees represent less than a 1% increase in radio station expenses.

The same performance fee would represent about 8%-10% of the radio industry's pre-tax profits (for all those stations with revenues above \$25,000).⁵¹ On balance, the proposed performance fee for performers and record makers is not likely to seriously impair the profitability of the growing and generally prosperous radio industry.

Ability of Broadcasting Companies to Pass Forward the Costs of a Performance Royalty

Although the preceding analysis demonstrates clearly that broadcasting companies can easily absorb the costs of a performance royalty, the stations could, if they so elected, pass this new expense forward just as other programming costs and profit increases have been successfully passed on in higher advertising rates.

⁵¹ According to the FCC's AM-FM Broadcast Financial Data—1973, radio stations with revenues over \$25,000 had total profits before taxes of \$118,261,000 in 1973.

Indeed, it is equitable for the stations to pass along the costs of a performance royalty, because advertisers benefit directly from the audiences that sound recordings attract.

Furthermore, radio has raised its advertising rates repeatedly over the years. For example, from mid-year 1973 to mid-year 1974 alone, radio spot advertising rates rose 9%, and in the three years between mid-1971 and mid-1974 the rise in radio spot ad rates was 24%.⁵² All these increases were far greater than the 1% increase that would be required if radio were to pass forward fully the proposed new performance royalty.

Although radio advertising rates have been raised periodically, the increase in these rates has been considerably lower than for prices generally. Although the Consumer Price Index rose 47% between 1967 and June, 1974, the rates for network radio ads rose 7% and those for spot radio ads rose 30%.⁵³ Thus the prices radio advertisers paid for their advertising rose much more slowly than the prices at which the advertisers sold their own products.

Even with these price increases, however, advertising costs per thousand of audience—which is a much more meaningful measure of cost than the rate per minute of time—are far lower for radio advertisers than for advertisers in print media.⁵⁴ For example, in 1974 the J. Walter Thompson Agency estimated that the cost per thousand readers for daily newspapers (1,000 lines black and white, all daily papers) was \$7.85, and the cost per thousand for consumer magazines (one 4-color page in top 50 magazines) was \$6.39. In contrast, the cost per thousand viewers for prime-time network TV (one 30-second announcement) was \$2.54, and the cost per thousand listeners for daytime spot radio (25 adult Gross Rating Points⁵⁵) was \$1.91.⁵⁶

It is important to recognize that radio has distinct advertising advantages. A vice-president of Goodyear Tire is quoted as saying, "Radio and television may constitute the most satisfactory media buys during this period of inflation."⁵⁷ He reasoned that the price of paper has zoomed, the wages of printers have escalated, and the price of postage is climbing. He pointed out that radio and television have 'considerable latitude' in their cost structure, in contrast to the built-in costs of direct mail and other print media that work against adjustable rates. In addition, radio provides important advantages to advertisers wishing to reach specific local markets such as teen-agers, ethnic groups, and commuters. Radio also reaches important segments of local markets that are not inclined to read newspapers. Radio's appeal to advertisers is enhanced by the medium's focus on local rather than national advertising: In 1973, local sales provided 73% of radio advertising.⁵⁸ This focus enables radio to profit from the overall trend among advertisers to emphasize local more than national advertising. Local advertising expenditures in all media grew 70% between 1967 and 1973, while national advertising expenditures grew 35%.⁵⁹

Many factors beside price affect an advertiser's choice of media. Among other things, the advertiser wants a medium that is appropriate for his particular product and his current advertising and marketing strategy. The effectiveness of a given medium in reaching the advertiser's target audience is a primary consideration. The advertiser is also concerned with the availability of openings in the various media, each medium's flexibility in placing and changing advertisements,

⁵² "1974-75 Cost Trends," Media Decisions, August 1974, p. 45. As indicated earlier, both network and spot radio advertising are national, but with network ads, the advertiser is restricted to network-affiliated stations, while with spot ads the advertiser can select the markets to which he wants his message beamed.

⁵³ Ibid.

⁵⁴ In comparing the costs per thousand of these media, it is recognized (as we will show), that each offers different advantages and reaches different markets. However, what the comparison and the following discussion indicates is that for those advertisers whose needs are already best met by the broadcasting media, a 1% increase in the cost per thousand for those media is not only negligible in an absolute sense, but would surely not provoke a substitution effect toward print media which carry a cost per thousand that is 800% higher.

⁵⁵ A Gross Rating Point is the percent of the population in a market listening to a station during a time period times the number of announcements.

⁵⁶ "Television Advertising Stakes Out New Turf for Future Growth," Broadcasting, November 18, 1974, p. 22.

⁵⁷ Statement by Edward H. Sonneck, Vice President, Corporate Planning, Goodyear Tire and Rubber Company, Akron, Ohio, summarized in "The dollars side of advertising gets going over in Phoenix," Broadcasting, May 13, 1974, p. 4.

⁵⁸ According to Advertising Age's Research Department, total expenditures on radio advertising in 1973 were \$1.7 billion, while local radio advertising expenditures were \$1.2 billion.

⁵⁹ Based on advertising expenditure figures supplied by Advertising Age's Research Department.

and the risk associated with the various media. Radio advertising, for example, has the great advantage that ads can be prepared on short notice and with a minimum expenditure of time and money. This makes radio a particularly appealing medium to advertisers during a recessionary period when there is uncertainty about markets, the size of companies' advertising budgets, etc. If, on the basis of all such considerations, an advertiser feels that a given medium is the most desirable for him, he will normally stick with that medium even if the medium's advertising rates rise.

For all these reasons, a small—1% maximum—increase in radio advertising rates to cover a performance fee paid performers and recording companies is not likely to have an appreciable effect on advertising sales in these media and is equally unlikely to promote substitution of other media. Broadcasters, if they elected to pass on the performance fee, could become simply a conduit for placing the cost upon the advertisers. In effect, the broadcasters could collect the fee from their advertisers and then transmit it to performers and recording companies. The fee would simply pass through the broadcasters' hands without affecting their financial situation. The cost of the fee would, in effect, be paid by advertisers who are currently benefiting at no cost to themselves from the talent and money invested in recordings by performers and recording companies. Furthermore, as we shall next show, such a fee even with a nominal markup by broadcasters would represent no great burden for advertisers.

The Proposed Performance Royalty Would Have a Negligible Impact on Consumer Product Costs

We have shown that it is equitable for radio stations who benefit directly from the playing of recordings, to pay for the commercial value they derive from the use of other people's property and creativity. It is equally equitable for advertisers to do so. Advertisers benefit from the fact that radio reaches a vast audience. This audience "pays," in a sense, for the free music on radio by listening to commercials. Advertisers should pay for the use of recordings that attracts this audience for their commercials. Artists and recording companies deserve compensation for the indispensable contribution they make to the selling of cars, cosmetics, and the host of other products advertised on radio.

If broadcasting companies raised their advertising rates to cover a performance fee paid to artists and recording companies, the impact on advertisers' budgets, and, ultimately, on product costs would be negligible. For example, the Ford Motor Company, one of the top ten radio advertisers in the country, spent \$13.9 million on network and spot radio ads in 1973.⁶⁰ Suppose, as an illustration, Ford even spent an equal, additional amount on local radio ads. Then its total expenditures for radio advertising in 1973 would have been around \$28 million. If the advertising budget had to be increased by 1% (\$280,000) to cover the pass-through of the performance fee from radio broadcasters, and if Ford passed these costs on to the consumer, the impact on one of the roughly 2 million vehicles Ford produces every year would be miniscule. Indeed, the impact of any markup on this total taken by broadcasters would also be minimal. It is far more likely for the sum to simply be absorbed within Ford's operating budget.

Similarly, the Coca-Cola Company, another major radio advertiser, spent \$8.3 million on national network and national spot radio ads in 1973.⁶¹ If Coke spent even an equal, additional amount on local radio ads, its total radio advertising expenses might approximate \$16.6 million. A 1% increase in these costs would equal \$166,000. Again, it is most likely that this sum would be lost in the costs of Coke's doing several billion dollars worth of business each year. However, if this increase due to a performance royalty were passed forward to the consumer in a general price increase, the performance right's share would represent a minute 0.0079% increase in prices (\$166,000 divided by Coca-Cola's 1973 sales of \$2.1 billion). This sum, spread out over billions of bottles of Coke, would be imperceptible to consumers and wholesalers alike.

In short, the impact on consumer product costs of the proposed performance fee for performers and recording companies would scarcely be perceptible either to advertisers or to consumers, even if the new fee were passed forward fully. No appreciable effect would be felt on consumer prices.

⁶⁰ According to "Advertising, Marketing Reports on the 100 Top National Advertisers," *Advertising Age*, August 26, 1974, pp. 27ff, Ford spent \$13.9 million on network and spot radio ads in 1973 and had sales of \$23 billion.

⁶¹ According to *Advertising Age*, August 26, 1974, p. 27ff, Coca-Cola spent \$8.3 million on network and spot radio ads in 1973 and had sales of \$2.1 billion.

Television Stations Should Also Pay for Their Use of Sound Recordings

Television stations also make use of recorded music, particularly as theme songs and background music for their programs. Although audiences may be less conscious of the music on television than on radio, television's performance royalty payments to composers and publishers actually exceeded those of radio in 1973, the last year for which data are available. Total music license fees paid by television exceed \$41.5 million in that year. It is no doubt true that a higher proportion of this total amount was for live performances than was true for radio; nevertheless, use of recorded music is substantial.

Just as composers and publishing corporations are entitled to compensation for the use of their music on television, so artists and record makers are entitled to compensation for the use of their copyrighted recordings. The performance royalty prescribed in this bill would require television stations to pay only token sums to recording companies and artists. Television stations with annual revenues of \$1 to \$4 million would pay only \$750 a year, and stations with revenues over \$4 million would pay \$1,500 a year. Total television payments, which would be divided between artists and recording companies, would equal \$429,000—less than one-tenth of one percent of television station profits in 1973. (See Exhibit 7.)

EXHIBIT 7

PERFORMANCE ROYALTY TV STATIONS WOULD PAY RECORDING COMPANIES AND ARTISTS UNDER S. 1111—H.R. 5345

	Number of stations	Annual performance royalty per station	Total performance royalty per year
Television stations with revenues of \$1,000,000 to \$4,000,000.....	304	\$750	\$228, 000
Television stations with revenues over \$4,000,000.....	134	1, 500	201, 000
Total.....	438		429, 000
Total 1973 pretax profits of television stations with annual revenues above \$25,000 (excluding networks) ¹	622		468, 800, 000
Performance royalty as percent of pretax profits.....			0.09

¹ TV stations with revenues over \$1,000,000 have 93 percent of all TV station expenses and probably an even higher percentage of TV station profits since 81 percent of the stations in this revenue category are profitable, while profits are enjoyed by only 48 percent of the stations with revenues under \$1,000,000.

Source: FCC, "TV Broadcast Financial Data—1973".

Television is a highly profitable industry and would scarcely feel the pinprick of such small performance royalties paid artists and record makers.

Total television pre-tax profits rose 58% between 1967 and 1973.² (See Exhibit 8 on the page following.)

² According to the FCC's annual TV Broadcast Financial Data, television pre-tax profits rose from \$414.6 million in 1967 to \$653.1 million in 1973.

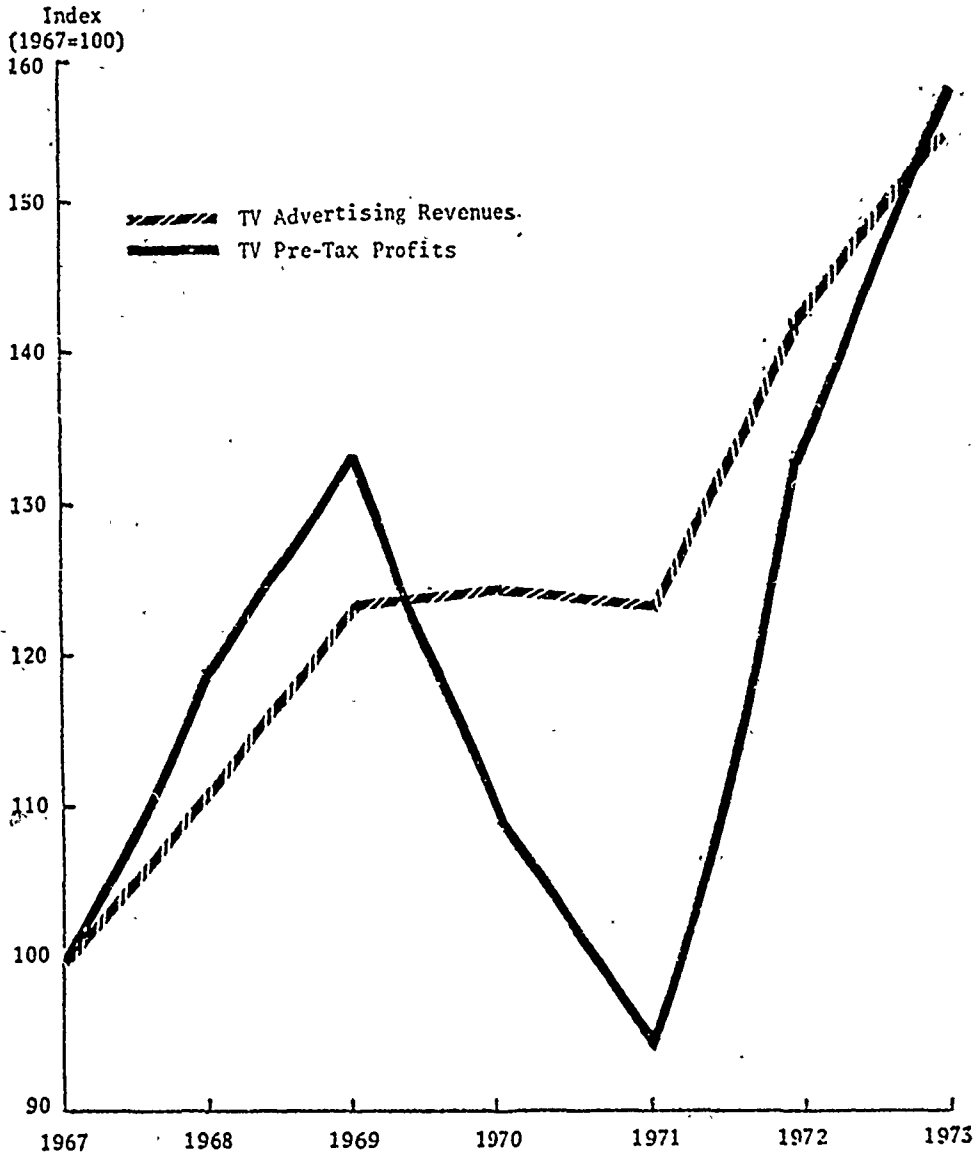


EXHIBIT 8. —Television revenues and pretax profits 1967-1973.

Sources: FCC's annual reports on TV broadcast financial data.
Research department of Advertising Age.

Television enjoys an unusually high profit level. In 1973, television's pre-tax profits were 18.8% of its revenues.⁶³

Advertising dollars spent on television rose 54% between 1967 and 1973.⁶⁴ The Commerce Department predicts that television revenues will grow about 9% a year between now and 1980.⁶⁵

Unlike radio, television's growing revenues appear to be the result of increases in its advertising prices rather than increases in the amount of time it sells, largely because available time is frequently sold out. Network television advertising revenues rose 35% between 1967 and 1973, a period during which the cost per minute of advertising on nighttime network TV rose 47%, and on daytime network TV, rose 33%.⁶⁶

⁶³ FCC's annual reports on Broadcast Financial Data for TV.

⁶⁴ According to the Research Department of Advertising Age, television advertising revenues rose from \$2.9 billion in 1967 to \$4.5 billion in 1973.

⁶⁵ FCC's annual reports on Broadcast Financial Data for TV.

⁶⁶ According to the Research Department of Advertising Age, network television revenues were \$1,455 million in 1967 and \$1,968 million in 1973. Network ad price indices are from "1974-75 Cost Trends," Media Decisions, August 1974, p. 45.

Television's audience has been growing. Between 1968 and 1973 the audience for nighttime network TV grew 8%, while the audience for daytime network TV grew 26%.⁶⁷ Because of the growth in television audiences, television ad costs per thousand viewers grew more slowly than did ad costs per minute: cost/1,000 viewers rose 12% for daytime network TV and 20% for nighttime network TV.⁶⁸

Television profits are so high, that the industry could absorb the entire performance royalty proposed in this bill, and its income statement would remain virtually unchanged if television paid the royalty entirely out of its profits; television stations with revenues above \$25,000 would continue to enjoy a 22.7% pre-tax return on sales. (The rate would merely ease from 22.76% to 22.74%.⁶⁹)

If television stations should elect to pass the new royalty on to advertisers in higher rates, the increase in rates would be so slight that it would be unlikely to affect television ad sales or to have any appreciable effect on advertisers' budgets or on consumer prices.

The Proposed Royalty Will Not Affect Composers and Publishing Companies

No suggestion is currently being made that the performance fees radio and TV broadcasting stations now pay to composers and publishing companies should be reduced if the stations should be required to begin paying performance fees to performers and record makers. The new performance fee would simply increase the total payments that stations already make for the use of recordings.

The performance fees paid composers and publishing companies have been growing rapidly. Between 1963 and 1973, the performance fees collected by U.S. composers and publishing companies nearly tripled, rising from \$40.5 million to \$114.4 million. (See Exhibit 9 on this page.) These performance royalties are almost 4% of broadcasters' revenues, and, as broadcasters' revenues have grown, the royalties have escalated. The U.S. Commerce Department predicts that both radio and television revenues will grow by about 9% a year between now and 1980.⁷⁰ Because the performance royalties earned by composers and publishing companies are tied to revenues, these interested parties may be expected to enjoy an expanding royalty base in the years to come.

EXHIBIT 9
INCOME TO COMPOSERS AND PUBLISHERS FROM RECORDINGS, 1973 VERSUS 1963

	1963 million)	1973 (million)	Percent increase 1963-73
Estimated total performance fees paid U.S. composers and publishers	\$40.5	\$114.4	+182
Estimated total copyright fees	44.5	117.1	+163
Estimated copyright fees paid by U.S. record companies	37.6	82.1	+118
Estimated copyright fees received by U.S. composers and publishers from foreign record companies	6.9	35.0	+413
Estimated total income received by U.S. publishers and composers from both copyright and performance fees	85.0	231.5	+172

SOURCES

1963 figures are from the 1965 Glover report before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, U.S. House of Representatives, 89th Cong., 1st sess.

The 1973 figure for mechanical fees paid by U.S. record companies was calculated from statistics supplied to RIAA by 34 record companies representing about 98 percent of the industry's sales. The actual 1973 mechanical fee payments reported by these companies was \$80,400,000, but the figure for the entire industry is estimated to be \$82,100,000 (80.4 divided by 96 percent).

The 1973 figure on foreign mechanical fees was estimated from "Billboard" reports about sales abroad of recordings of U.S. music.

1973 performance fees were calculated as follows:

\$37,500,000 in music license fees paid by radio stations and networks (FCC figures)

\$47,800,000 in music license fees paid by TV stations and networks (FCC figures)

\$19,400,000 in ASCAP receipts from general and background music; symphonic and concert music; and royalties from foreign societies (ASCAP figures)

\$9,700,000 estimated BMI and SESAC receipts from these three sources (estimated to be roughly half ASCAP receipts)

⁶⁷ "Broadcasting in 1975: Shipshape in a Shaky Economy," *Broadcasting*, January 13, 1975, p. 35.

⁶⁸ "1974-75 Cost Trends," *Media Decisions*, August 1974, p. 45.

⁶⁹ Television stations with annual revenues of \$25,000 or more, had net revenues of \$2,059,847,000 and pre-tax profits of \$468,803,000 in 1973, according to the FCC's "TV Broadcast Financial Data—1973" (August, 1974).

⁷⁰ U.S. Department of Commerce figures cited in "Government Report Plots Good Growth Through 1980 for Radio, TV, Cable," *Broadcasting*, November 11, 1974, p. 48.

CONCLUSIONS: PERFORMANCE RIGHTS SHOULD BE GRANTED TO RECORD-MAKERS AND PERFORMERS

The general Copyright Revision Bill grants performance rights to every performable copyrighted work except sound recordings.

Both record makers and performers make a major creative contribution to recordings and their creative contribution merits full copyright protection.

Almost every other Western nation pays performance royalties to performers and record companies.

Broadcasters should pay performers and record makers for the commercial value they extract from sound recordings.

The broadcasting industry enjoys high profits, in part because of its use of recordings at little cost, and the industry could pay the small performance royalty proposed without seriously impairing its profitability.

Because they do not now make such payment, advertisers, in turn, are indirectly benefiting from music programming on radio and television at rates which do not reflect the true costs of the talent and money invested in recordings by performers and record companies.

The profit position of the broadcasting corporations could be preserved by passing forward the costs of the proposed new performance royalty to their advertisers who are the ultimate beneficiaries, without decreasing the attractiveness of the media.

If advertisers in turn passed on the costs of a performance royalty to the consumer, the impact would be imperceptible.

Senator SCOTT. We now come to the witnesses who are opposed to S. 1111. The opponents of the measure have a right to be heard so we will receive their testimony at this time. We have with us today Mr. Vincent Wasilewski, Mr. John Dimling, Mr. Harold Krelstein and Mr. Wayne Cornils. Do I have the right people?

Mr. WASILEWSKI. Yes, sir, Mr. Chairman.

Senator SCOTT. Mr. Wasilewski, you may proceed.

STATEMENTS OF A PANEL COMPOSED OF VINCENT T. WASILEWSKI, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, ACCOMPANIED BY JOHN DIMLING, VICE PRESIDENT, RESEARCH; HAROLD KRELSTEIN, CHAIRMAN, RADIO BOARD OF DIRECTORS; WAYNE CORNILS, CHAIRMAN, SMALL MARKET RADIO COMMITTEE; AND THOMAS WALL, ESQ., COUNSEL, DOW, LOHNES & ALBERTSON

Mr. WASILEWSKI. Mr. Chairman, my name is Vincent T. Wasilewski. I am president of the National Association of Broadcasters, which is located at 1771 N Street NW., Washington, D.C. The NAB is a nonprofit trade association, which has a membership of 4,079 AM and FM radio stations, 540 television stations and all national radio and television networks.

Mr. Chairman, broadcasters regard themselves as partners in the business of bringing to America her citizens' artistic efforts in making phonograph records. We appear before you today as a partner who has unwittingly and we think unwisely and unjustifiably been forced to defend itself against a copyright scheme which has no place in the copyright law of the United States.

And we are asked to defend ourselves against the payment of a fee which flies directly in the face of trade practices, economic realities, and the Constitution of the United States.

The so-called performance rights amendment would require, for

the first time, that radio and television stations pay royalties to performing artists and record companies for the air play of their records.

Record companies and recording artists argue that this assessment is justified by the fact that a record is the creative work of both the record company and the recording artist, that radio stations are able to use this work without compensating the artists, and that the "promotion of the useful arts and sciences" suffers thereby.

As the primary vehicle for the dissemination of the sounds on sound recordings, we are not here to denigrate the artistry of the recording industry. Anyone who has heard the Beatles singing on "Sgt. Pepper's Lonely Hearts Club Band" or Julie London singing the "Mickey Mouse Club Song" to a congressional committee knows full well just how talented and creative the music industry can be. But talent and creativity do not a copyright make. And it is copyright that we are here to discuss.

A copyright is a governmentally sanctioned monopoly. In a nation which traditionally abhors monopoly there must be some overriding reason to confer monopoly status on any endeavor. In the case of copyright, that overriding reason is provided by the desire to encourage creativity and once having encouraged it, to protect and nurture it. When we enact a copyright statute, one eye must therefore remain steadfastly on one question—is this copyright—this constitutionally mandated, yet radical, departure from the norm of national policy, necessary to foster and protect creativity?

We believe that the Performance Rights Amendment of 1975 fails to meet the rigid test necessary to confer full copyright status upon any class of creative endeavor. We do so in a manner which we believe is not unmindful of the unique qualities of the recording industry. Indeed we recognize that in our continuing support for the protection of sound recordings from unauthorized privacy.

But we are also convinced that creativity in the recording industry is not solely the province of the record company and the record artist. There is a third partner in that process—another participant whose efforts are primarily responsible for huge increases in record sales and audiences at recording artists' concerts—the radio industry.

And the radio industry believes that it, too, serves the creative process, that it insures broad exposure for creative works, that via the air play of records, it encourages and promotes the sale of original artistry, that it provides the compensatory spur to additional creative efforts by record companies and recording artists.

For all of that, we seek no compensation from the recording companies, we ask for no promotional fee. We seek merely the continuation of a copyright law and an economic marketplace which has satisfied the spirit of the copyright provision of the Constitution.

The statutory grant of a copyright confers upon its recipient two fundamental rights—the right to protect the integrity of his creation from unauthorized use and the right to demand compensation by one who seeks authorization to use it. And those rights are granted for one purpose alone.

The Constitution provides that the Congress shall have the power "to promote the progress of science and the useful arts by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries."

The Constitution does not mandate copyright—it confers power upon the Congress to provide it. Indeed, in the construction of the language of the provision, the framers' intent, is clear—it is not the paramount interest to secure exclusive rights—it is the goal of promoting the progress of science and the useful arts which is preeminent.

Mr. Chairman, the NAB believes that the "promotion of the useful arts and sciences" demanded a limited copyright for the purpose of preventing the unauthorized piracy of sound recordings.

When such legislation was before the 93d Congress we wrote every Member of Congress indicating our support for the proposal.

We felt then, as we do now, that the copyright law should not allow record pirates to steal the creative endeavors of the record industry. In passing that legislation, the Congress satisfied the artist's right to the protection of the integrity of his creations.

Having done that, however, Congress is now asked to give record companies and recording artists copyright compensation for the use of records by radio stations. We think it is unnecessary and unfair. We believe that they are compensated already, albeit indirectly, and that any additional assessment would represent an unfair burden on the broadcast industry and a windfall for the record industry.

Broadcasters currently pay copyright fees. Radio and television stations pay approximately 3.5 percent of their net advertising receipts to the publishers, lyricists, and composers of musical works. We are asked now to pay an additional 1 percent, subject to periodic review, for the play of records on radio and TV.

And we are asked to pay that 1 percent to an industry that is growing faster than the industry which fuels its growth.

Mr. Chairman, in the controversy of the performance rights amendment there is no disagreement between the proponents and opponents on the fact that indirect compensation does flow to recording interests and record companies.

The form of that compensation is the promotional benefit reaped by the artists and companies for air play of their work.

And the amount of the compensation is staggering. Mr. Chairman, the evidence that there is no disagreement on the value of air play to the record industry comes not from the broadcasting industry but from the record companies themselves. Listen, for a moment, to their words—to the words of Stan Cornyn of Warner Brothers Records:

What would happen to our business if radio died? If it were not for radio, half of us in the record business would have to give up our Mercedes leases * * * we at Warners won't even put an album out unless it will get air play.

Listen to the words of Bobby Colomby, the drummer of the rock group, Blood, Sweat and Tears, in answer to the question, how important is radio to you? "Well, that is it * * * what you are doing is * * * you are advertising."

That the revenue does flow to performing artists and record companies is self-evident. The amount of such revenue is not. A closer look reveals that additional revenues are not only unnecessary but unwarranted as well.

There are several distinct groups of people who are involved in bringing about recorded music; the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record.

Revenue comes from two sources, record sales and air play of the record. NAB retained Dr. Frederic Stuart of Hofstra University to estimate the relative amounts of money each of the four parties realized from the sale and air play of recorded music; and the results of his research are enlightening and somewhat surprising.

Under present arrangements, all four parties—that is, composers, publishers, artists, and record companies receive money from the sale of records, but only composers and publishers receive payment for broadcast performances—air play of a record.

Dr. Stuart estimated the revenues generated by a random sample of records, and he found that the income was distributed as follows:

Composers.....	\$2, 570, 000
Publishers.....	2, 910, 000
Performing artists.....	2, 860, 000
Record companies (after variable manufacturing costs).....	10, 720, 000

But these figures do not reflect two important factors:

1. The artists and recording companies must bear the cost of unsuccessful records—so that the amounts of money they receive should be reduced to take this into account.

2. In many cases the performing artists are also the composer, and/or publisher of the songs they record, so they also receive royalties from air play of the records.

Refining his figures to take these factors into account, Dr. Stuart found that the distribution of money from this same sample of records looked like this:

Composers.....	\$1, 530, 000
Publishers.....	1, 200, 000
Performing artists.....	4, 200, 000
Record companies.....	10, 000, 000

He concluded:

The foregoing analysis shows the performing artist to be * * * well ahead of * * * composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies and none of these figures takes into account the substantial revenues generated by live concerts.

Mr. Chairman, I submit that the performance rights amendment does not belong in this copyright bill. It is recommended neither by the constitutional guidelines nor the economic marketplace.

It fails to promote the progress of science, it imposes an unreasonable burden on a symbiotic partner in the music industry, and promises windfall profits for those for whom no need can be demonstrated. For all of these reasons, we ask that you reject it.

Thank you.

Senator SCOTT. Thank you. Do you have a copy of letter from Miss Ringer's correspondence to me? If you don't, we will make it available to you. She speaks of the constitutionality of the amendment and concludes that it is constitutional.

Mr. WASILEWSKI. No, sir, I do not.

Senator SCOTT. Appearing in one of the testimonies this morning was the statement:

It is unreasonable and unfair to let the cable industry ride our backs, to take our property, resell it, and not pay us a dime. That offended my sense of the way things ought to work in America.

Isn't that commentary also applicable to the performing artist?

Mr. WASILEWSKI. No, sir, I do not believe it is.

Senator SCOTT. Is the product resold without payment?

Mr. WASILEWSKI. The cable is using the same product that we as broadcasters are using. We are paying for that product. We are asking for an extension of the existing copyright, namely the copyright that exists in motion pictures, the sports promotions, and such endeavors.

It is a reflection of the fact that there are certain elements of unfair competition because we are using the same product, paying for that product and cable is not. It is not money that broadcasters are asking to be reimbursed for by cable. Cable should pay for their utilization of already copyrighted works. Recordings are not already copyrighted works.

Senator SCOTT. Broadcasters pay for virtually every other form of broadcasting they employ except sound recordings, yet they pay nothing to the recording and the performing artist who furnish 75 percent of their programming.

I am speaking of the staff and the supporting artists, not the wealthy artists. We have testimony that the average income of a recording artist (predominantly supporting artists) is about \$4,060 a year. If all other services broadcasted are paid for, why is there no compensation for the artist who produces the music?

Mr. WASILEWSKI. The broadcasters do pay directly for these other services. We feel we pay indirectly to all other of the staff and recording artists. Some of them are outstanding and do get reimbursement. But it seems to me that you have a situation where the sidemen, if you will, the ordinary musicians, are seeking a statutory enactment from the broadcasters to reimburse that individual when in truth of fact, the proper place would be for him to go through his union and negotiate so he too can get a fair share of the royalty from the record sales.

It is the outstanding performer who gets a share of those record sales. I don't see why those other people, namely the sidemen and other musicians should not also get a fair share.

Senator SCOTT. It is their complaint that they don't. It has been alleged that the performance royalty would place a large burden on the radio stations. At worst, this amendment would require a \$2 a day payment by small radio stations.

Do you think that would adversely affect their ability to operate profitably?

Mr. WASILEWSKI. Not in the 2 years covered in that legislation.

Senator SCOTT. What you fear is the revision of renewable features?

Mr. WASILEWSKI. We are opposed to the principle of the bill, Mr. Chairman.

Senator SCOTT. We have some more witnesses. I have got a time problem here.

Mr. WASILEWSKI. With me on my—

Senator SCOTT. At 12 o'clock I have a meeting with Senator Schweiker and the Pennsylvania congressional delegation. We will have to recess over lunch but in the interim would you introduce your colleagues here?

Mr. WASILEWSKI. On my left is Mr. Harold Krelstein, who operates six AM and FM stations. Also Mr. Wayne Cornils from Nampa,

Idaho, and he has a statement he would be glad to submit for the record. Mr. Krelstein has no statement.

Senator SCOTT. I would not want to cut you off. We can come back at 2 o'clock.

Mr. WASILEWSKI. No, sir. I think you full well understand our position in this regard. May we submit the statements for the record?

Senator SCOTT. We allowed more time than I intended for the other witnesses. If you want to submit statements, we can do it that way.

Mr. WASILEWSKI. If Mr. Krelstein were to have 3 or 4 minutes now—

Mr. KRELSTEIN. I doubt very much that I can repeat yesterday's performance since I had no formal script then and I have none now. I have devoted 41 years of my life to broadcasting and I have seen over the years what I consider to be some very interesting and unique developments.

I can't repeat yesterday's because the posture here is a little different than it was in the House committee. It is a known fact of life that phonograph records are important to a broadcast station but it is also a fact of life that they are no guaranty of the successful profitability of a broadcasting station.

We have a reciprocal agreement where today the broadcast industry accounts for about \$2 billion of record sales. The latest figures available show that in 1973 the reporting radio broadcasting stations showed a drop of 16 percent in profits to approximately 8 percent of their revenue. Music is important but it is not exclusive to a radio station.

We are in such cities as Atlanta, Baltimore, Boston, Chicago, Memphis, St. Petersburg, Tampa, operating AM and FM. In the city of Chicago there are 64 radio stations available and most of these stations are playing the same music.

Music is not exactly the only ingredient in programing that provides the edge for superiority in terms of listener acceptance. To digress for a moment to the matter of classical music, in the early forties we pioneered the programing of classical music in the city of Memphis.

Through two services from RCA and Columbia Masterworks these two companies represented most of the well known artists at this time—we devoted the evening hours to the playing of these music selections with disastrous results. We felt that as a licensee in the public trust, we had an obligation to play this music for the benefit of the artists.

The record companies wanted it played in the hopes they could stimulate the sale of these classical recordings. Classical music in Memphis has not generated enough revenue to pay my salary for 1 year, and I do not consider myself overpaid.

The fact of the matter is that the record companies supply us with a finished product and we supply them with air time.

To me this is an exchange of equity because the only thing we have for sale is time. If we use that time to play a record we don't have that time available. I am not going to get into the intricacies of what the air play has meant to the performers because the thrust here does not seem to be the performers.

It more rightfully seems to be in the area of the technicians who provide the background music, who are the sidemen for the solo performers, the Elton Johns, Chicago, and Alice Cooper.

If those men were able to negotiate for themselves to the extent that Elton John, currently very popular, received a guaranteed contract for an advance payment of \$8 million in royalties then Elton John had a moral, ethical obligation to negotiate for his sidemen, the unsung heroes, the musicians who back him up.

We are being asked to share the burden, by an already over burdened industry, at the manufacturing level. This is an employee-employer relationship that is being attempted to be transferred to the responsibility of the broadcaster.

If I am a musician in Nashville, Tenn., where the bulk of today's music is today recorded, it seems to me somebody has to negotiate for these musicians on a basis that gives them a part of the massive royalties that come to the recording companies for the sale of this music.

This industry could not have grown to a \$2 million industry because people don't have to buy records because they can hear them on the air.

People want them. It is a personal product for them in their home to be played when they want to hear it. They are not going to sit and listen to a radio station for 24 hours a day in the hopes that they might hear 1 Elton John recording.

Senator SCOTT. Just because Elton John will not take care of his sidemen, should they be penalized?

Mr. KRELSTEIN. Why should that be the responsibility of the broadcasters who made Elton John what he is today? Frank Sinatra? In years gone by—I say years gone by because he is not as popular as he was in the years gone by.

Senator SCOTT. I will send him a copy of the transcript. [Laughter.]

Mr. KRELSTEIN. I think it is not the responsibility of the broadcasters to supplement these sidemen at the manufacturing level.

[The prepared statements of Mr. Vincent T. Wasilewski, president, National Association of Broadcasters and Mr. Wayne C. Cornils, president and general manager, KFXD and KFXD/FM, Nampa, Idaho, appear in full as follows:]

STATEMENT BY VINCENT T. WASILEWSKI, PRESIDENT OF THE NATIONAL
ASSOCIATION OF BROADCASTERS

Mr. Chairman, my name is Vincent T. Wasilewski. I am President of the National Association of Broadcasters, which is located at 1771 N Street, N. W., Washington, D.C. The NAB is a non-profit trade association, which has a membership of 4,079 AM and FM radio stations, 540 television stations and all national radio and television networks.

Mr. Chairman, broadcasters regard themselves as partners in the business of bringing to America her citizens' artistic efforts in making phonograph records. We appear before you today as a partner who has unwittingly and we think unwisely and unjustifiably been forced to defend itself against a copyright scheme which has no place in the copyright law of the United States. And we are asked to defend ourselves against the payment of a fee which flies directly in the face of trade practices, economic realities and the Constitution of the United States.

The so-called "Performance Rights Amendment" would require, for the first time, that radio and television stations pay royalties to performing artists and record companies for the air play of their records. Record companies and recording artists argue that this assessment is justified by the fact that a record is the creative work of both the record company and the recording artist, that radio stations are able to use this work without compensating the artists, and that the "promotion of the useful arts and sciences" suffers thereby.

As the primary vehicle for the dissemination of the sounds on sound recordings, we are not here to denigrate the artistry of the recording industry. Anyone who has heard the Beatles singing on "Sgt. Pepper's Lonely Hearts Club Band" or Julie London singing the "Mickey Mouse Club Song" to a Congressional committee knows full well just how talented and creative the music industry can be. But talent and creativity do not a copyright make. And it is copyright that we are here to discuss.

A copyright is a governmentally-sanctioned monopoly. In a nation which traditionally abhors monopoly there must be some overriding reason to confer monopoly status on any endeavor. In the case of copyright, that overriding reason is provided by the desire to encourage creativity and once having encouraged it, to protect and nurture it. When we enact a copyright statute, one eye must therefore remain steadfastly on one question—is this copyright—this constitutionally mandated, yet radical, departure from the norm of national policy—necessary to foster and protect creativity?

We believe that the "Performance Rights Amendment of 1975" fails to meet the rigid test necessary to confer full copyright status upon any class of creative endeavor. We do so in a manner which we believe is not unmindful of the unique qualities of the recording industry. Indeed, we recognize that in our continuing support for the protection of sound recordings from unauthorized piracy.

But we are also convinced that creativity in the recording industry is not solely the province of the record company and the record artist. There is a third partner in that process—another participant whose efforts are primarily responsible for huge increases in record sales and audiences at recording artists' concerts—the radio industry. And the radio industry believes that it, too, serves the creative process, that it ensures broad exposure for creative works, that via the air play of records, it encourages and promotes the sale of original artistry, that it provides the compensatory spur to additional creative efforts by record companies and recording artists. For all of that, we seek no compensation from the recording companies, we ask for no promotional fee. We seek merely the continuation of a copyright law and an economic marketplace which has satisfied the spirit of the copyright provision of the Constitution.

The statutory grant of a copyright confers upon its recipient two fundamental rights—the right to protect the integrity of his creation from unauthorized use and the right to demand compensation by one who seeks authorization to use it. And those rights are granted for one purpose alone.

Article I, Section 8 of the Constitution provides that the Congress shall have the power "to promote the progress of science and the useful arts by securing for limited time to authors and inventors the exclusive right to their respective writings and discoveries." The Constitution does not mandate copyright—it confers power upon the Congress to provide it. Indeed, in the construction of the language of the provision, the framers' intent is clear—it is not the paramount interest to secure "exclusive rights"—it is the goal of promoting the "progress of science and the useful arts" which is preeminent.

Mr. Chairman, the NAB believes that the "promotion of the useful arts and sciences" demanded a limited copyright for the purpose of preventing the unauthorized piracy of sound recordings. When such legislation was before the 93rd Congress we wrote every member of Congress indicating our support for the proposal. We felt then as we do now that the Copyright Law should not allow record pirates to steal the creative endeavors of the record industry. In passing that legislation, the Congress satisfied the artist's right to the protection of the integrity of his creation.

Having done that, however, Congress is now asked to give record companies and recording artists copyright compensation for the use of records by radio stations. We think it is unnecessary and unfair. We believe that they are compensated already, albeit indirectly, and that any additional assessment would represent an unfair burden on the broadcast industry and a windfall for the record industry.

Broadcasters currently pay copyright fees. Radio and television stations pay approximately 3.5% of their net advertising receipts to the publishers, lyricists and composers of musical works. We are asked now to pay an additional one percent, subject to periodic review, for the play of records on radio and TV. And we are asked to pay that one percent to an industry that is growing faster than the industry which fuels its growth.

Mr. Chairman, in the controversy of the "Performance Rights Amendment" there is no disagreement between the proponents and opponents on the fact that

indirect compensation does flow to recording interests and record companies. The function of that compensation is the promotional benefit reaped by the artists and companies for air play of their work. And the amount of the compensation is staggering. Mr. Chairman, the evidence that there is no disagreement on the value of air play to the record industry comes not from the broadcasting industry but from the record companies themselves. Listen, for a moment, to their words—to the words of Stan Cornyn of Warner Brothers Records:

"What would happen to our business if radio died? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases . . . we at Warners won't even put an album out unless it will get airplay."¹

Listen to the words of Bobby Colomby, the drummer of the rock group, "Blood, Sweat and Tears" (in answer to the question, How important is radio to you?): "Well, that is it . . . what you're doing is . . . you're advertising." (Emphasis added)².

That the revenue does flow to performing artists and record companies is self-evident. The amount of such revenue is not. A closer look reveals that additional revenues are not only unnecessary but unwarranted as well.

There are several distinct groups of people who are involved in bringing about recorded music: the composer of the music, the publisher, the artist who records the music, and the record company that produces and distributes the record. Revenue comes from two sources—record sales and air play of the record. NAB retained Dr. Fredric Stuart of Hofstra University to estimate the relative amounts of money each of the four parties realized from the sale and air play of recorded music; the results of his research are enlightening and somewhat surprising.

Under present arrangements, all four parties—that is, composers, publishers, artists and record companies—receive money from the sale of records, but only composers and publishers receive payment for broadcast performances (air play of records). Dr. Stuart estimated the revenues generated by a random sample of records; he found that the income was distributed as follows:

Composers	\$2, 570, 000
Publishers	2, 910, 000
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But these figures don't reflect two important factors: (1) the artists and recording companies must bear the cost of unsuccessful records (so that the amounts of money they receive should be reduced to take this into account); and (2) in many cases the performing artists are also the composer and/or publisher of the songs they record, so they also receive royalties from air play of the records.

Refining his figures to take these factors into account, Dr. Stuart found that the distribution of money from this same sample of records looked like this:

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He concluded: "The foregoing analysis shows the performing artist to be . . . well ahead of . . . composers and publishers in the distribution of income generated by the broadcasts and sales of records, but rather far behind the record companies, and none of these figures takes into account the substantial revenues generated by live concerts."

Mr. Chairman, I submit that the "Performance Rights Amendment" does not belong in this copyright bill. It is recommended neither by the constitutional guidelines nor the economic marketplace. It fails to "promote the progress of science," it imposes an unreasonable burden on a symbiotic partner in the music industry, and promises windfall profits for those for whom no need can be demonstrated. For all of these reasons, we ask that you reject it.

STATEMENT BY WAYNE C. CORNILS, PRESIDENT AND GENERAL MANAGER KFXD
AND KFXD/FM, NAMPA, IDAHO

Mr. Chairman, my name is Wayne C. Cornils. I own approximately 20% of the Idaho Broadcasting Company and serve as president and general manager of KFXD/AM and KFXD/FM, Nampa, Idaho.

¹ Daily Variety, March 4, 1975.

² Radio Program "The Politics of Pop"—June 5, 1975.

I am also privileged to serve as Chairman of the Small Market Radio Committee of the National Association of Broadcasters. The other members of the Small Market Radio Committee operate broadcast properties in Deming, New Mexico; Indianola, Mississippi; Valdese, North Carolina; Brattleboro, Vermont; and Mankato, Minnesota. The Small Market Radio Committee represents radio broadcasters in markets of 100,000 population or less.

The small market broadcaster is a person totally involved with, completely dedicated to and an integral part of the community he serves.

Much of what is defined as entertainment programming on a small market radio station is provided in the playing of recorded music.

In addition to the numerous other expenses of operation, the small market broadcaster is required to pay monthly fees to several music licensing organizations, including BMI, ASCAP and SESAC. The monies thus paid are distributed by these organizations to the composers, lyricists and publishers.

Now, Mr. Chairman, we are faced with the so-called "performance rights amendment," which would require us, for the first time, to pay royalties to performing artists and record companies.

There can be no doubt in anyone's mind that the exposure given to recorded music by the broadcast industry encourages and promotes the sale of records. In turn, the sale of records obviously encourages and promotes additional creative efforts by record companies and recording artists. Mr. Chairman, radio sells records.

In Boise, Idaho, a community of approximately 90,000 and the adjacent city of Nampa, a community of approximately 20,000 there are 26 outlets where records may be purchased. All of these retailers would agree that exposure on radio provides the primary impetus for the purchase of records.

Last week, I spoke with Mr. Nelson Taylor, who is the manager of the Super Thrift Drug Stores in Nampa. Mr. Taylor told me, "If it were not for record exposure on radio, I would not have a record department."

And Bob Gordon, manager of the record departments of the Bon Marche Department Stores, told me that he has removed his record audition booths because the customers have already heard the records on radio.

And Gary Pratt, the owner of Gary's Stereo, sells 8-track tapes and cassette recordings, a business by the way, which has developed as an outgrowth of the record industry. At Mr. Pratt's request, each week I send him the KFXD-AM playlist. Mr. Pratt orders his tapes and cassettes directly from that list.

So, there can be no doubt in the minds of the managers in the 26 record outlets in the Nampa-Boise area about the important role played by radio in the sale of records. Radio sells records.

Attesting to the recording artists' popularity due to radio exposure are the large fees which these artists are able to command for personal appearances. I have a colleague in Omaha who tells me that 15-20 recording artists or groups appear in that city during the course of a year. In Omaha, the minimum fee for a single appearance is approximately \$5,000—this for artists such as Jim Stafford, the Righteous Brothers and Dr. John. Others, like Alice Cooper and John Denver, receive \$20-30,000, while some, like Elvis Presley, receive \$100,000.

In Nampa/Boise the figures are very similar: \$15,000 for the Carpenters; \$25,000 for the Beach Boys; \$18,000 for Chicago; and for Elton John, a rather staggering 80% of the gross, against a guarantee of \$30,000. These fees are for a single performance or what is called "a one-night stand."

Radio not only sells records, but provides the audiences for recording artists.

In conclusion, Mr. Chairman, composers, publishers and lyricists receive compensation in the form of monies paid by broadcast stations to the music licensing organizations. The record companies, artists and composers receive monies from the sale of records—sales which are promoted by the exposure of their product on radio. In addition, the artist receives huge sums of money for personal appearances. As we have pointed out, the fees for personal appearances are determined by the artist's popularity and the artist's popularity is determined, to a large degree, by the exposure received on radio.

Mr. Chairman, to charge broadcasters an additional fee is unnecessary, unfair and unjust. It would place an extremely heavy burden on all broadcasters, certainly including those of us in America's smaller markets.

Thank you.

Senator Scott. The two remaining witnesses, Mr. Russell Mawdsley, of the Music Operators of America, and Mr. Perry S. Patterson, representing several of the record manufacturing companies

will have their statements and articles placed in the record. We are keeping the record open until August 1, so that additional statements can be added by any interested person. Any comments you want to make regarding the testimony of the proponents or opponents of the measure will be received.

[Whereupon, at 12:05 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[The prepared statements of Mr. Russell Mawdsley, chairman, Legislative Committee, Music Operators of America, Inc. and Mr. Perry S. Patterson, on behalf of Rock-Ola Manufacturing Corp., The Seeburg Corp. and Rowe International, Inc., appear in full as follows:]

STATEMENT OF MR. RUSSELL MAWDSLEY, IMMEDIATE PAST PRESIDENT AND CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF MUSIC OPERATORS OF AMERICA, INC.

Mr. Chairman, I am Russell Mawdsley of Holyoke, Massachusetts. I appear here in behalf of Music Operators of America, Inc., in opposition to Senate bill 1111, which is referred to as the Performance Rights Amendment of 1975. Music Operators of America, Inc. (MOA), is the national organization of jukebox operators which has members in every State of the Union. I am the immediate past president of the organization and presently serve as chairman of its national legislative committee.

I am president of Russell-Hall, Inc., a firm which operates jukeboxes, amusement machines, and a full line of vending machines in the greater western Massachusetts area, an area which is centered around the city of Springfield, Massachusetts. My firm operates about 100 jukeboxes, 150 amusement machines, and 700 vending machines, in about 450 locations in this area. I am also active in local associations of jukebox operators and in business and civic organizations in my home city of Holyoke, Massachusetts.

I wish to register the strong opposition of Music Operators of America to Senate bill 1111, the provisions of which are substantially similar to provisions for performance royalties for record manufacturers and performers which were deleted from the Copyright Revision Bill when the Senate considered and passed that Bill in September 1974 (S. 1361, 93rd Congress).

Senate bill 1111 would add \$1.00 per jukebox per year to the new jukebox royalty of \$8.00 per machine per year that would be created by the pending Copyright Revision Bill, S. 22, 94th Congress. That new \$8.00 royalty was adopted as a compromise when the House of Representatives considered and passed a copyright revision bill several years ago. Later, the Copyright Subcommittee of the Senate Judiciary Committee also adopted the \$8.00 royalty out of a desire to conform to the rate provided in the copyright legislation passed by the House of Representatives (Senate Report 93-983 on S. 1361, 93rd Congress, page 152).

Music Operators of America, Inc., opposes S. 1111 for the following reasons:

1. It would upset the compromise agreement by which the proposed \$8.00 jukebox royalty was first established. That proposal, I should add, was intended to replace the existing exemption of coin-operated musical performances from performance fees, by a fixed statutory royalty, that would serve as a maximum limit on jukebox royalties. Before that \$8.00 royalty can become fixed in our statutory law, however, we are now seeing new efforts to increase jukebox operators' liabilities under the copyright law.

2. The proposed new royalty would add a new burden of at least \$450,000 a year ($75¢ \times 450,000$ machines) to an industry of small businessmen, who already will be burdened by some \$3,600,000 ($\$8 \times 450,000$ machines) in new jukebox royalties and by at least \$4,500,000 ($6¢ \times 75,000,000$ records) in mechanical royalties, under Sections 115 and 116 of S. 22, the pending Copyright Revision Bill.

3. We wish to impress upon the Committee the fact that the jukebox industry is an economically depressed industry. Like most other industries, the costs of our equipment and materials have been rising drastically. Our singles records now cost on an average 75¢ per record, which is a marked increase from the 60¢ which a typical operator reported to the House Judiciary Committee at its hearings in 1965 (Hearings on H.R. 4347, 89th Congress, Part I, page 570). Wages of

our electronic and mechanical technicians and our other costs of operations have risen even more drastically, and are continuing to rise.

On the other hand, jukebox operators are unable to increase prices per play so as to keep abreast of their increasing costs of operations. In some businesses, prices can be increased merely by changing the price tag, and the change may not be noticed. In our industry, it is a matter of reducing the number of songs a customer can play for a quarter, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent obtained, for he may object that a raise in the cost to play music will be detrimental to his business. Prices of two plays per quarter have been established by operators in some areas, but this is by no means generally accepted. In many areas, rates are still at 10¢ per play or three plays for a quarter, and there are even some areas where the rate remains at 5¢ per play.

These conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from operation of jukeboxes. This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations. In fact, I am quite certain from my own experience that most operators cannot afford to operate jukeboxes unless they also operate amusement and vending machines. Further emphasizing the serious economic condition of the jukebox industry was discontinuance, in 1974, of the manufacture of jukeboxes by the Wurlitzer Company, which was one of the four American manufacturers of jukeboxes.

4. Jukebox operators serve as promoters of records, and contend, therefore, that they provide a service to performers and record companies which is of sufficient benefit to obviate any claim for the payment of royalties for play of records on jukeboxes.

5. Record manufacturers and performers, traditionally, have secured compensation for their recordings through contractually negotiated royalties. They do not need added Congressional assistance to demand and receive adequate compensation for their recordings. Just this week, for example, Billboard magazine is reporting a \$9,900,000 distribution to musicians throughout the United States from the Phonograph Record Manufacturers Fund, a fund which provides annual distributions to musicians, and was created by private contractual negotiations without the intervention of Congress. We urge the Committee, therefore, to require record manufacturers and performers to come forward with proof that any such Congressional assistance is needed before any such statutory benefits are conferred upon them.

6. In the face of continuing reports of "payola" in the recording industry we question whether record manufacturers can demonstrate their competence or entitlement to statutorily created royalties which would only aggravate a problem that industry seems unable to control.

7. We also oppose a statutory royalty for record manufacturers and performers because we believe Congress lacks the power to confer such benefits upon them. In our view, record manufacturers, particularly, are not "authors" within the meaning of the Copyright Clause of the Constitution. In giving equal benefits to record manufacturers, along with performers, we believe this Bill is fatally defective and cannot stand.

8. Finally, we oppose any new royalty for the recording arts as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kinds of musical copyrights they should be shared in a single royalty among all those who claim to have contributed to the finished product.

In closing, I would like to state to this Committee that within the jukebox industry there have been, and still are, many who vigorously oppose the creation of any performance royalty to be paid by jukebox operators. This is because they believe jukebox operators perform a compensating service in the play of music on their machines. Any proposal to impose a new royalty upon jukebox operators would substantially intensify that opposition and would make it increasingly difficult for the industry's leaders to preserve support for the provisions of the Copyright Revision Bill as the industry's representatives have agreed to them.

We earnestly urge your Committee, therefore, to disapprove the bill, Senate 1111.

Thank you for giving us this opportunity to present the views of Music Operators of America, Inc.

[The article referred to by Mr. Mawdsley in his statement appeared in the July 26, 1975, issue of Billboard magazine and is as follows:]

MUSICIANS TASTING FAT \$9.9 MIL MELON

(By Is Horowitz).

NEW YORK.—One busy horn player in Los Angeles will bank an extra \$35,000 next week when he receives his slice of the \$9,915,620 melon to be distributed by the Phonograph Record Manufacturers Special Payments Fund.

Checks going out Aug. 1 represent the largest payoff since the fund was established in 1964. The total is some 30 percent over the \$7.6 million dispensed in 1974. This year's sum will be divided among just over 41,000 union musicians, also a record number, who played at least one record date during the past five years.

Smallest checks, for \$9.90, will go to those who played only a single date in 1970, and none since. But 775 frequently-employed AFM stalwarts will get more than \$5,000 each.

Name of the Los Angeles sideman is being withheld by fund guardians, but his \$35,000 "royalty" places him at the work summit of all musicians playing for recordings.

The fund's bankroll comes from record manufacturers who contribute .05 percent of their gross sales at suggest list, less a 15 percent packaging deduction and an additional allowance of 20 percent for free goods on product recorded under AFM jurisdiction. Material recorded abroad is exempt, even though manufactured and sold in this country or Canada.

Eight AFM locals, with Los Angeles' Local 47 well out in front at 35 percent, will share in 80 percent of the fund money, a breakdown of the prout shows. New York's Local 802 accounts is second at 19 percent, and Nashville's Local 257 accounts for 15 percent of the total.

After these power jurisdictions the falloff in recording work and fund payoffs is rapid. Chicago accounts for 3 percent; Memphis, Detroit and Toronto about 2.5 percent each; and Montreal 1.5 percent.

Manufacturer payments to the fund are due semi-annually on Feb. 15 and Aug. 15. Books are closed on April 30 each year in calculating musician shares. While most credit to sidemen is given for recordings made during the most recent accounting period, lesser credit is given, on a descending scale, to session work going back over five years. This is to provide some continuing payment to recording musicians according to a fund spokesman.

STATEMENT BY PERRY S. PATTERSON, ON BEHALF OF ROCK-OLA MANUFACTURING CORP., THE SEEBURG CORP., AND ROWE INTERNATIONAL, INC.

Mr. Chairman and members of the subcommittee, my name is Perry S. Patterson. I presently reside in Coudersport, Pennsylvania and appear as counsel for the Rock-Ola Manufacturing Corporation, The Seeburg Corporation, and Rowe International, Inc., the only manufacturers of coin operated automatic phonographs in the United States.

I am a member of the District of Columbia, Maryland, Illinois and Pennsylvania bars. I am a retired partner of the Chicago and Washington firm of Kirkland, Ellis and Rowe and the foregoing companies, and other manufacturers who have vanished from the scene, have been represented by partners of my former firm and by me on copyright legislation matters for at least forty years.

Senator Scott's Bill, S. 1111, would drastically expand the provisions of S. 2223 relating to performance royalties in audio or visual recordings by creating a hitherto non-existent right to royalties for public performances via radio, television, coin operated phonographs, background music or CATV on the part of "performers" who are defined as "musicians, singers, conductors, actors, narrators and others" whose performance of a literary, musical or dramatic work is embodied in a sound recording. Obviously the multimillion dollar revenues of the existing Performing Rights Societies, ASCAP, BMI, and STSAC, have impressed the performers of copyrighted works and the record manufacturers with the apparently limitless potential sources of revenues from the entertainment media and accordingly they are seeking a share as a class of persons with the contemplation of the constitutional copyright privileges which are accorded to Authors and Inventors, for limited times, to exclusive rights to their writings and discoveries.

Given the obvious economic incentives, those who would create a broad class of performers to be rewarded for their various talents appear to have no difficulty in asking for statutory definition of their royalty entitlement. It goes without

saying that to superimpose through the vehicle of copyright an additional royalty fee on the reproduction of sound recordings on jukeboxes and upon radio and television broadcasters, who already are paying royalties for the use of copyrighted works of composers, authors and publishers, would give rise to substantial additional costs necessarily to be borne ultimately by the consuming public.

Inevitably either new performers rights organizations or expanded existing organizations are required to decide which performers among the myriads of musicians, singers (choruses and choirs), conductors, narrators, actors and others are entitled to share in the new royalty.

The purpose of this memorandum is not to advise the Committee on the resolution of the claimed economic or equitable entitlement of performers as a broad class, but to point out that it is inappropriate in view of the fundamental constitutional questions involved to create a class of literally thousands of potential claimants plus record manufacturers and establishing a precedent for even broader extension of the concept of copyright protection.

The equitable and economic justification for the use of the Federal Copyright Law to extend to record producers is exhaustively analyzed in an article in Volume 43, No. 1, November 1974 issue of The George Washington Law Review. In the 86 page study, the authors, Messrs. Robert L. Bard and Lewis S. Kurlantzick ultimately conclude that there is no economic justification for the establishment of a hitherto non-existent public performance right with respect to records. The authors demonstrate that performers are already being adequately compensated for their capacity to produce records attractive to broadcasters. Record and tape piracy, they note, are no longer a threat to manufacturers in view of the Federal and State laws on the subject. The authors conclude with the following statement—particularly relevant in the light of recent focus of attention on the problem of payola:

"Finally, establishment of the public performance right inevitably will increase the existing strong pressures inducing record producers to offer improper inducements to employees of the broadcast industry to get their records played on the air."

The Committee should not simply decide whether the granting of copyright protection to performers and record manufacturers would be "sound policy", although even from a policy standpoint there are sound grounds for excluding the performers from the General Revision. The Committee must work within the constraints imposed by the limited grant of authority conferred by Article I, Sec. 8, cl. 8 of the Constitution, which gives Congress the following power:

"To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The language, purpose and history of this clause demonstrate that it is not a license to confer copyright or patent monopolies on any group who might appear deserving of economic reward, and, as the following paragraphs will indicate, an attempt to grant such a monopoly to performers and record manufacturers poses very real constitutional problems.

The issue of "performers' rights" is not one of first impression before the Congress or the Judiciary Committee. Bills have been introduced periodically since 1936 with the objective of creating performers' monopolies. Kaplan & Brow Cases on Copyright, Unfair Competition, and Other Topics Bearing on the Protection of Literary, Musical, and Artistic Works 590 (1960). Congress has heeded before the warning that an attempt to create such rights would go beyond the power of Congress. See Hearings Before Subcommittee on Patents, Trademarks and Copyrights of the House Committee on the Judiciary on H.R. 1269, 1270 and 2570, 80th Congress, 1st Sess., ser. 10, at 20, 30, 34-38, 232, 267, 269, 270, 277 (1974).

Two cogent explanations of why copyright protection for performers and record manufacturers would be of dubious constitutionality were developed during the above hearings. First, the Copyright Clause gives Congress the power to afford protection to "Authors and Inventors". A performer, as defined in the Scott Bill is simply not an author much less an inventor. It includes virtually everyone participating in either a major or minor role as an actor, singer, musician and in addition, conductors, narrators and others. The definition of what constitutes a performer whose talents may be copyrightable is sweeping but the determination of which performers are to receive royalties and in what amount carry the prospect of new unwarranted economic burdens to the entire entertainment industry including jukebox operators, jukebox manufacturers and the public

If so broad a definition of "Author" had been intended, then the framers would not have felt called upon to include the word "Inventors" in the Clause. For surely an inventor is as much an author in his field as a performer is in his. The framers, however, expressly included "Inventors" in the Copyright Clause, and from this inclusion one must conclude that the framers intended to have "Authors" take its ordinary accepted meaning.

The second basis for rejection was also based on the literal phrasing of the Copyright Clause. This Clause authorizes Congress to secure to authors the "exclusive right" to their writings. A performer works with a writing which is usually copyrighted or upon which the copyright has expired but in any event which someone else has authored. Since the author has been granted an "exclusive right" in the work, it is simply illogical and unreasonable for the performer to superimpose on such a right a further entitlement to royalties for performing the work or making a record of it.

For these and other reasons prior attempts to enact statutes establishing performers' copyright protection have been rejected. See, e.g. H.R. 1270, 80th Congress, 1st Sess. (1947), reported adversely by a Subcommittee of the House Judiciary Committee, 93 Cong. Rec. pt. 15, at p. D406 (1947). There is no reason for suspecting the correctness of Congressional judgment in the past. The Senate in enacting S. 1361 deleted the performers' and record manufacturers' royalty. This Committee has no basis for taking a contrary view.

In spite of the above, the contention has been made that performers should be regarded as authors and their performances should be considered to be writings. It will be argued that changing times have created concepts of authorship that did not exist when the Constitution was drafted, and that the Constitution must be interpreted to reflect that fact. Admittedly, a capacity for growth must be read into the Copyright Clause. In many instances this argument may have merit, but not in the case of performers as defined in the Scott Amendment. There were plenty of performers, i.e., actors, musicians, singers, etc., around at the time the Constitution was adopted and it is not conceivable they were regarded as authors. They are not a new concept although record manufacturers are. If the framers had wanted to create a sweeping monopoly on behalf of a broad class of performers there was no barrier to their doing so. If they had chosen to confer such a monopoly on actors, musicians and other performers they could have done so by simply writing Art. 1, § 8, cl. 8 as follows:

"To promote the Progress of Science and useful Arts, by securing for limited Times to Authors, Inventors and Performers the exclusive right to their respective writings, discoveries and performances." (Emphasis added).

If the Senate feels moved to expand the scope of the Copyright Clause to reach performers and record manufacturers, it must answer affirmatively the following questions: "Does the public interest necessitate the creating of this new type of monopoly?" "Is the country faced with such a shortage of performers of non-dramatic art that the public interest requires new incentives to draw people into these fields?" Hardly. There appears to be little or no justification from the standpoint of promoting the progress of Science and the Useful Arts for extending the copyright monopoly to performers and record manufacturers.

There has been an indicated disposition on the part of the Supreme Court to scrutinize the constitutionality of certain instances of protection granted under the present statute, even in cases where the issue of constitutionality was not raised by the parties. In *Mazer v. Stein*, 347 U.S. 201 (1954), the Supreme Court held that a sculpture was within the scope of the Copyright Act. The pending General Copyright Revision, S. 3223, expressly includes sculptures. Justice Douglas, in a concurring opinion in which he was joined by Justice Black, stated that the Court should face the constitutional issue even though not raised. *Id.* at 219-21. With reference to the Copyright Clause he wrote:

"The power is thus circumscribed: It allows a monopoly to be granted only to 'authors' for their 'writings'. Is a sculptor an 'author' and is his statue a 'writing' within the meaning of the Constitution? We have never decided the question." *Id.* at 219-20.

After listing a number of articles which the Copyright Office had accepted, the Justice stated:

"Perhaps these are all 'writings' in the constitutional sense. But to me, at least, they are not obviously so. It is time that we came to the problem full face." *Id.* at 221.

Thus, it is evident that there is some doubt even with regard to those things covered in the present act.¹ This is surely not an invitation for Congress to go farther, particularly where the sweeping and unqualified definition of "performers" which includes the catch-all, "others", not only brings a multitude of new potential royalty claimants into the picture but where it would establish a precedent for the creation of royalty entitlement in talented athletes such as figure skaters, golfers, tennis players, basketball players and the like, to say nothing of comedians and news commentators.

The Supreme Court has demonstrated in even more recent cases that it has a preference for curtailing monopoly in the patent and copyright areas. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964) and *Compco Corp. v. Bay-Brite Lighting, Inc.*, 376 U.S. 234 (1964). In these cases the Supreme Court struck down state attempts to extend the property rights of creators beyond those validly granted by the federal patent and copyright laws. The Court expressly stated that, "To forbid copying would interfere with federal policy found in Art. I, Sec. 8, cl. 8 of the Constitution . . . *Compco, supra* at 237." This is a policy of allowing monopoly only in limited areas for limited times.²

In summary, this Committee must not allow the arguments of contending economic interests to obscure Congress' responsibility to remain within the limits defined by the Copyright Clause. This power does not extend to creating a monopoly on the behalf of performers and record manufacturers.

Mr. Mawdsley has described the problems faced by the music operators and their monetary contribution to the performing rights societies and the music industry.

I will direct myself to the plight of the manufacturers. We are not living in what can be described as normal economic times and there are few industries that cannot demonstrate declining sales and employment over the past several years. However, in the case of the automatic phonograph manufacturers, which numbered about 10 thirty years ago, three now remain. The three companies for which I speak are Rock-Ola, Seeburg, and Rome International.

In 1974 the Wurlitzer Corporation, which had manufactured musical instruments since 1856 and automatic phonographs since 1908 discontinued the manufacture of automatic phonographs because of the deteriorating economic climate of the industry.

I attach as Exhibit A an extract from the 1974 Annual Report of Wurlitzer explaining its reasons for withdrawal from the automatic phonograph field.

The three surviving manufacturers for whom I speak have not benefited yet from Wurlitzer's withdrawal from competition. Each company has supplied me with information concerning their operations but have requested that I consolidate such information for reasons of competitive confidentiality.

In the aggregate, dollar sales volume and unit production is down between 20% and 30%. Employment is down drastically, in one company from 1,450 employees to 450 employees. Another company has shutdown production for three months. Distributors' inventories in certain instances are as much as 300% above normal and sales are not improving.

The juke box business has not kept pace with population growth. It is estimated that there are fewer juke boxes in operation now than in the period 25 years ago after World War II.

Mr. Mawdsley has detailed the present and prospective monetary contribution of the industry to the record industry and the performing rights societies. Enactment of H. R. 2223 as now drafted will result in a contribution by the operators to the music industry of an estimated \$8,500,000.00 a year. This is nearly 10% of the total distributions of the performing rights societies ASCAP, BMI and SESAC which in 1974 was reported to be approximately \$97.5 million.

The manufacturers believe the operators are contributing their fair share for their use of music and recommend approval of Section 116 of H. R. 2223 as drafted. They oppose any amendments which would expose the operators to additional monetary burdens.

¹ Mere copying is not copyrightable cf. *Donald v. Meyers TV Sales*, 426 F.2d 1027, cert. denied 400 U.S. 392.

² Note, however, that the copying is not itself the subject of further copyright. To obtain valid copyright the material must be original, although the cases vary widely on the degree of novelty, originality or variation required for a new copyright. 17 U.S.C.A. § 1 note 13, annotations.

EXHIBIT A

JUNE 1, 1974.

TO THE SHAREHOLDERS OF WURLITZER:

It is interesting to realize that the modern, complex, multi-national Wurlitzer Company of today was founded 118 years ago in a simple, pastoral setting in Cincinnati, Ohio. Here a young German named Rudolph Wurlitzer was engaged in the business of importing musical instruments for a frontier society. The company he founded thrived, as did the nation, with various members of the Wurlitzer family active in the management for well over a century. The last surviving son of the founder was Fanny R. Wurlitzer, who died May 6, 1972 after 68 years of dedicated service.

In the 118 year span of the Company's growth, the steady rise in standard of living in the countries served by The Wurlitzer Company has provided the public with time and money to enjoy musical instruments of all types. The Company has been successful in fulfilling this need and each year has continued to supply the kinds of instruments most wanted, both in the United States and throughout the world.

Two major new product lines were established during the year. One was the highly competitive Sprite organ line supplementing our medium and higher priced electronic organs. The introduction of the Sprite models to Wurlitzer dealers produced the largest number of advance orders for a new product in the history of the Company. Manufacture of a line of low-priced electronic organs including table models was also initiated during the year for sale through private label distribution. This product line has excellent growth potential.

Engineering and research activities have continued unabated to achieve innovative products, outstanding styling, and the greatest possible cost savings in manufacturing. Wide use of electronics in our products has been aided by the continued application of the new technology of Large Scale Integrated Circuits (LSI). The Wurlitzer Company was the first in the industry to produce electronic organs using LSI components.

Manufacturing efficiency has advanced during the year with the continued trend toward mechanized assembly and test in our factories. Although capital expenditures are necessarily high for special equipment, the operating cost savings are substantial. Additional manufacturing capacity resulted from the establishment of a Central American facility operating on a contract basis. This facility manufactures certain subassemblies for use in our various plants. The major Wurlitzer manufacturing activities are conducted at four plants in the United States and two in Europe, with additional manufacturing or licensed assembly operations in three locations in Latin America and one in South Africa.

To grow in the musical instrument world market requires the use of a variety of up-to-date marketing techniques. This year we have successfully brought into use many techniques in market research, sales training, advertising and promotion, and a variety of other skills necessary for aggressive world-wide operations. Marketing skills must, of course, be closely coupled with engineering, manufacturing, and financial activities of the highest order to achieve the overall forward thrust of growth for which the Company has been noted in recent years.

Our U.S. marketing operations for keyboard products consist of over eight hundred independent Wurlitzer music dealers and forty-seven Company owned retail music stores. Foreign marketing operations are handled by seven Company owned marketing subsidiaries as well as a large number of worldwide independent music dealers and phonograph and vending equipment distributors. This marketing organization grew in strength and breadth during the year, bringing fine Wurlitzer products to new markets.

REVIEW OF OPERATIONS

In the year ended March 31, 1974, The Wurlitzer Company achieved the highest level of consolidated sales in its 118 year history. Major achievements were also made in strengthening the Company for future growth and earnings through progress in technology, manufacturing, and marketing.

During the year engineering and research programs brought into being new competitive models in our pianos, key and action products, electronic pianos, electronic organs, and coin-operated products. Research programs in progress promise further important advances for the future. Manufacturing capability has been improved in all of our U.S. plants through the introduction of new methods and specially developed machinery. Manufacturing operations were started at

the new Wurlitzer plant in Levern, Germany and a subassembly manufacturing operation was started with an associate firm in Guatemala, C.A. Final steps in the closing of the manufacturing plant at DeKalb, Illinois were completed early in the year, and manufacturing operations at Logan, Utah are improving steadily. Marketing operations have been strengthened by careful training and assignment of skilled personnel at both wholesale and retail levels. At Cheshire, England a new sales office and warehouse building was completed at the Parkgate Industrial Estate for Wurlitzer Limited, our subsidiary for keyboard product sales in Great Britain. Marketing operations in Europe were realigned for improved sales coverage in various Common Market countries. A major decision was reached to discontinue manufacture and sale of coin-operated phonographs in the U.S., a move which is expected to enhance future earnings.

Consolidated net sales on a world-wide basis for the year were \$90,069,712, an increase of 7% over the previous year's sales of \$83,842,546 and the highest ever achieved. The U.S. sales accounted for 81% of the total and foreign sales for 19%. Imported growth occurred in all products except coin-operated phonographs.

Electronic organ sales continued its vigorous growth pattern of recent years showing an increase in dollar sales volume of about 24% over last year largely in our medium and higher priced organ products manufactured at Corinth, Mississippi. Two new electronic organ product line programs were undertaken by the Company during the year with manufacturing responsibility placed at the North Tonawanda Division. One is the Sprite organ line, a moderately priced series of organs with wide popular appeal. This product line, introduced at the June 1973 convention of National Association of Music Merchants, was an immediate success and produced a very substantial backlog of orders. At North Tonawanda intensive effort has been devoted to getting production underway on Sprite products to satisfy dealer demand. A second product line was also initiated during the year consisting of a series of low priced organs including battery-operated table models. Distribution has been primarily through non-Wurlitzer dealer channels. Acceptance of this line has been good and the future growth possibilities look attractive.

The Wurlitzer electronic piano is becoming a very popular product, and the increase in dollar sales over last year was 13%. Wurlitzer conventional pianos also showed an increase in dollar sales volume over last year. Sales of the widely accepted Wurlitzer cigarette and vending machine line in Europe continued to grow in the amount of 15% over last year.

Although our keyboard products business is profitable, vigorous, and growing rapidly, the overall operations of the Company resulted in a loss. Fortunately, many of the problems producing this result are now behind us and improved earnings for the future are clearly in prospect. The major trouble area affecting the earnings picture during the past year was our coin-operated phonograph business which has been unsatisfactory from the profit viewpoint for the last few years. At a Board of Directors' meeting on March 5, 1974 it was decided to discontinue phonograph manufacturing and selling operations in the United States. It was also decided to continue to manufacture and sell phonographs and related products outside of the United States through our German subsidiary, Deutsche Wurlitzer, as well as other subsidiaries engaged in sales on a world-wide basis. The decision to discontinue U.S. phonograph operations was a difficult one to make, but it is expected to enhance our financial position in the future in a number of beneficial ways.

The consolidated net loss for the year ended March 31, 1974 was \$7,702,682, or \$6.23 per share after a pre-tax provision of \$11,366,000 for losses on disposal of our U.S. coin-operated phonograph business. This provision was a direct result of the decision to discontinue the coin-operated phonograph business and is believed to be adequate to cover the expected losses and costs associated with liquidation of the U.S. phonograph operations. We expect overall company operations for the year ending March 31, 1975 to be profitable.

Consolidated net earnings in the previous year ending March 31, 1973 were \$2,191,171, or \$1.77 per share before an extraordinary charge of \$313,747 and \$1,877,424, or \$1.52 per share after the extraordinary charge.

The achievement of record dollar sales this year is evidence of the wide acceptance of Wurlitzer products all over the world. We believe world-wide interest in music is being stimulated partly by the new types of sounds and musical features available to the public. Products such as the Wurlitzer Orbit series of electronic organs with synthesizers and the Wurlitzer electronic piano have been a part of the growth of interest in new sounds, and it is expected that the trend will accelerate.

Wurlitzer U.S. retail music stores were profitable and expanded from forty-two stores at the beginning to forty-seven stores at the year end. The new stores were established following a successful pattern of site location research which has been developed in the last few years. Such stores were opened in metropolitan areas where satisfactory independent dealers are not available.

Although many achievements for future growth of the Company were made during the year, and future operations are expected to be profitable, the overall Company operations for this unusual year resulted in a loss, primarily due to the discontinuance of our U.S. coin-operated phonograph business.

In our coin-operated phonograph business, operating losses were sustained both in U.S. and some foreign subsidiaries due to steadily rising costs, limited market growth, heavy investment in all areas and high interest rates. As a result of the current situation as well as poor future prospects in the domestic market for this product, the Board of Directors decided on March 5, 1974, to sell or liquidate the coin-operated phonograph segment of the Company's business in the United States and to close all branches of Wurlitzer Distributing Corporation as soon as practicable. The Company will continue to manufacture electronic organs in North Tonawanda, and we will also continue to manufacture and market coin-operated phonographs, cigarette machines and other vending equipment and accessories at our subsidiary, Deutsche Wurlitzer, West Germany.

In keyboard products the healthy profit and growth pattern of recent years was extended, but U.S. Government price controls continued to be a problem in pricing domestic products. Costs of material and labor have increased in an abrupt and unanticipated way on a world-wide basis. Added to this, material shortages and startup problems delayed deliveries in nearly all product lines, although back orders were, and still are, the highest on record. Sales and profits of some foreign subsidiaries increased strongly but others were adversely affected by inflation, foreign and U.S. currency valuation changes, and customer reaction to the energy shortage crisis. All of these factors produced a rapidly shifting situation that temporarily limited profitability in certain of our foreign as well as domestic operations.

Although some adverse factors will continue throughout 1974, the Wurlitzer management team will respond quickly to solve the new problems that occur and improved operating results for the year are expected.

The forward strides made by the Company during the year are the result of dedicated, talented Wurlitzer men and women throughout the world. The new year offers many opportunities for growth which we welcome with optimism.

R. C. ROLFING,
Chairman of the Board,
Chief Executive Officer.
A. M. ASSAM,
Vice Chairman of the Board.

APPENDIX

AMERICAN BROADCASTING COMPANIES, INC., *New York, N.Y., August 7, 1975.*

HON. JOHN L. McCLELLAN,
*Subcommittee on Patents, Trademarks and Copyrights,
Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR McCLELLAN: American Broadcasting Companies, Inc. (ABC) wishes to provide your Subcommittee with its comments on S. 1111, a bill to extend to record companies and performers a public performance right in sound recordings parallel to existing federal copyright provisions granting public performance rights to composers.

It is the understanding of ABC that the hearing record on S. 1111 may have been closed on August 1st. Should this letter arrive too late for inclusion in the official record, ABC respectfully requests that its comments be associated with the Subcommittee's files.

ABC believes that S. 1111 would be an unwise and unnecessary extension of the copyright laws.

ABC is a major user of sound recordings; ABC's stations, and radio stations in general, are important outlets for the dissemination to the general public of recordings. It is a known fact that broadcasters greatly stimulate record sales by exposing new releases, and particularly those of relatively unknown artists, to potential buyers. Radio stations contribute immeasurably to the popularity of recordings and, therefore to the profits enjoyed by record manufacturers and performers alike. As radio play provides effective advertising and creates consumer demand, it is not surprising that record companies expend considerable efforts promoting the use of their material on the air. Unlike most advertising, which can only be descriptive of a given product, radio broadcast provides the potential buyer with a precise appraisal of the product.

Composers, record companies, and performers pay nothing for this valuable promotional effort. Legal and business considerations preclude broadcasters from charging for their use of such material. S. 1111, however, would compel broadcasters to pay those for whom air play already provides, directly or indirectly, major benefits. In addition, ABC, like all broadcast users, pays substantial amounts for performance rights to the music rights groups such as ASCAP and BMI, Inc.

It is argued that record companies and performers do not share equitably in the revenues generated either by broadcast or payments to the music rights groups. Uncompensated public performance of records produced jointly by record companies and performers, it is said, represents an expropriation by certain record users, principally broadcasters, of economic benefits to which record producers have a legitimate claim.

ABC finds this argument unconvincing and doubts that the proposed statute would even achieve its intended purpose of allocating a greater share of revenues to record companies and performers.

Professors Robert L. Bard and Lewis S. Kurlantzick recently published an article evaluating the issue of public performance rights for record producers in terms of economic theory and equitable and legal consequences.¹ They find no convincing argument for granting record producers such rights. Record public performance rights, they conclude, will not redress alleged injustices to musical artists whose records continue to be broadcast long after the exhaustion of their sales potential. Composers, rather than record companies and performers, would be the most likely beneficiaries of such a revision. Any benefits that accrued would not fall equally to performers and record companies, as many believe, but would be divided according to the relative bargaining powers of the parties involved,

¹ Bard and Kurlantzick, *A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It*, 43 Geo. Wash. L. Rev. 152 (1974).

and according to a complex set of economic and legal factors which statutory mechanisms cannot adequately comprehend.

ABC concurs in this opinion and believes the following excerpt from the Bard and Kurlantzick article aptly summarizes the difficulties confronting proponents of S. 1111:

"Amending the Copyright Act confronts an important principle which also is relevant to the formulation of copyright policy generally, indeed, to all economic regulation. At times there are desires to restructure the benefits of copyright law to favor creators—authors, composers, and performers—more, and the commercial participants in the creative and distribution process, such as publishers, record companies and broadcasters, less. It may be that authors and artists "deserve" a larger share of the revenues generated by the exploitation of their work, but it may not be possible to achieve this through changes in the copyright law. Whatever the initial allocation of rights in creative work under the law, a large part of these rights must be assigned to others in order to render them capable of returning significant income to their original holders. The author must usually deal with a publisher, the performer with a record company, etc. The author's success will depend less on the statutory rights which he initially possesses than on the variety of economic factors which determine his relative bargaining strength. In most circumstances, attempts to strengthen a weak bargaining position through granting an author or artist additional legal rights which affect one part of the economic relationship with a publisher or record company may be frustrated by a compensating adjustment in the remaining relationship."²

Under S. 1111 income attributable to the sale and performance of recorded music would be transferred from broadcasters to record companies and popular performers. Yet both these groups are prospering under the existing copyright regime. Record companies presently enjoy sufficient incentives to produce a very large output of new recordings. Performers are already compensated for their ability to produce records attractive to broadcasters.

As the National Broadcasting Company points out in its Statement to the Subcommittee of July 24, 1975, many successful recording artists, those most likely to benefit by the proposed statute, have their own recording companies and record under their own labels. These artists would reap an additional benefit in their dual capacity as performers and record company proprietors.

Furthermore, lesser known performers who are in the employ of recording companies are unlikely to gain measurable benefits from S. 1111. Although an equal division of performance right royalties is contemplated, experience dictates that legal and economic factors existing outside the statutory framework may effect a distinctly different ultimate allocation of revenues. Such has been the practice in the area of mechanical reproduction rights, whereby record companies usually obtain voluntary licenses from composers which permit them to avoid compulsory licensing provisions (17 U.S.C. § 1(e) (1970)). There is little reason to doubt that similar arrangements would result in practice as between performers and record companies.

The situation as to classical music is somewhat different from that of popular music. The argument has been made that the less popular arts, which by definition, do not have the ability to generate mass sales, ought to enjoy the augmented royalties which S. 1111 theoretically would provide. It is conceivable that a certain negligible benefit would flow to makers of classical records.

Most classical music is uncopyrighted; therefore, there is no music copyright holder to whom record producers must pay mechanical reproduction right royalties. Thus the classical record makers could retain all earnings from public performances. Bard and Kurlantzick conclude upon analysis of the peculiarities of this specialized market that classical records will not earn sufficient revenues from public performance fees to have any appreciable impact upon the production of classical records.

Classical music may need and deserve financial support as an independent matter, but establishing a record public performance right of wide applicability to producers of records of all types and tastes will only produce limited benefits, too small to affect classical record production and too small to justify wholesale legislation. Moreover, considerations bearing on the desirability of encouraging the production of classical records ought to be addressed in more appropriate legislation with narrower focus.

² Id. at p. 160, footnote omitted.

In sum, ABC opposes creation of a public performance right for record companies and performers as inconsistent with practical realities and as an unwise and unfair burden on broadcasters. Such a newly imposed obligation would also undermine the existing mutually beneficial relationships among record companies, performers and broadcasters.

Thank you for the opportunity of presenting these comments.

Very truly yours,

EVERETT H. ERLICK,
Senior Vice-President and General Counsel.

[Telegram]

JULY 24, 1975.

Senator HUGH SCOTT,
*U.S. Senate, Russell Senate Office Building,
Washington, D.C.*

Regret that matinee performance today makes it impossible for me to testify on your important legislation, S. 1111. Thank you, Senator, on behalf of performers everywhere. Recordings are the result of a collaborative effort by the composer, the performer, musicians and record producer. We are entitled to a performance royalty when our creative effort, as captured on a sound recording, is used by others for their own profit. Since we have no control over whether this creative effort is used by others, for profit, the least they can do is compensate us. This bill also provides long overdue recognition for the thousands of unsung instrumentalists and chorus singers who help create recordings. We ask Congress not for special favors. We ask equity, at long last.

ALFRED DRAKE.

MUZAK CORP.,
New York, N.Y., July 29, 1975.

Senator JOHN L. McCLELLAN,
*Dirksen Senate Office Building,
Washington, D.C.*

DEAR SENATOR McCLELLAN: I write to express the support of Muzak Corporation for S. 1111, the Performance Right Amendment of 1975.

Muzak is a New York corporation having its main office at 100 Park Avenue, New York City. It is a company that specializes in the physiological and psychological applications of music. Muzak transmits its music to subscribers premises either through a sub-channel of FM radio or leased wire from the telephone company. It is disseminated throughout all of the major cities in the United States, as well as 22 foreign countries.

As I understand it, S. 1111 would require those who "perform" copyrighted sound recordings for their profit to pay a royalty to the creators of those sound recordings—the performing artists and records company—to compensate them for the exploitation of their creative efforts.

Since Muzak was organized in 1936, we have created our own renditions of popular musical compositions, using recording artists we hire especially for this purpose. Other background music services, however, have been unwilling to commit the necessary creative and financial resources to the production of their musical offerings. Instead, they have simply spliced together selections from the most popular sound recordings available. Our competitors have been able to offer their customers the talents of the world's greatest performing artists for the nominal cost of a record.

We believe this practice to be unfair and unjust, both to the creators of the sound recordings, and to companies such as ours. Because Muzak does not expropriate the talents and efforts of others for its own enrichment, we have been put at a competitive disadvantage in the marketplace.

Congress should put an end to this inequitable situation. S. 1111 would eliminate the legal anomaly which rewards those who live off the labor of others. We urge you to lend your support to its enactment.

Sincerely,

U. V. MUSCIO, *President.*

NATIONAL BROADCASTING CO., INC.,
Washington, D.C., July 25, 1976.

Hon. JOHN L. McCLELLAN,
Chairman, Subcommittee on Patents, Trademarks and Copyrights, Committee on
the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR McCLELLAN: On Thursday, July 24, in the course of the Senate hearings before the Subcommittee on Patents, Trademarks and Copyrights, Senator Scott indicated the record would remain open until August 1 for submissions by those parties who wish to furnish material for the record.

We respectfully request that the attached statement of the National Broadcasting Company, Inc. be included in the record of these hearings.

Best regards.

Very truly yours,

PETER B. KENNEY,
Vice President..

Enclosure.

STATEMENT OF THE NATIONAL BROADCASTING COMPANY, INC.

National Broadcasting Company, Inc. ("NBC") respectfully makes this statement concerning S. 1111, a bill which would create a "performance right" in the use of copyrighted sound recordings for the benefit of record companies and performers.

We question both the logic and public benefit of the proposed statute and therefore do not support its passage.

Proponents of S. 1111 argue that the creation of a performance right is necessary to create a new source of revenue for lesser-known performers and musicians who work for record companies. We doubt that the proposed statute will have that effect, even assuming that such an objective is a valid subject for national legislative policy.

In the first place, 50 percent of the performance fees provided for in the statute would go to record companies, not performers. Nothing would compel these companies to use this money to pay performers.

Secondly, only those musicians and performers whose sound recordings are actually broadcast can benefit from or be compensated under the proposed legislation. Since the records that are most often played on radio and television are those of the most popular and well-known performers, lesser-known musicians and artists will benefit very little. The more popular performers—most of whom are already highly paid—will undoubtedly get the lion's share of the remaining 50 percent of the proposed performers' fees.

In this regard, it should also be noted that many successful recording artists today own their own recording companies and record under their own labels. The proposed statute would give these artists the double benefit of receiving royalties in their dual capacity as performers as well as record company owners.

The record industry is a multi-billion dollar enterprise. It grew to this size without subsidization from the broadcasting industry, and it is clearly able to survive without the imposition of these additional fees.

Broadcasters already pay substantial sums for the right to play music on the air. In 1973, for example, broadcasters paid over \$80 million in music license fees.¹

These payments remunerate the people who create artistic property and thus serve the policies of the copyright laws. S. 1111, on the other hand, does not square with the underlying objectives of copyright. The Constitutional purpose of copyright is to protect the "writings" of "Authors". Requiring such payments to performers will neither encourage them to be "Authors" nor result in their creating new "writings". This is not what the Constitutional copyright mandate was intended to achieve.

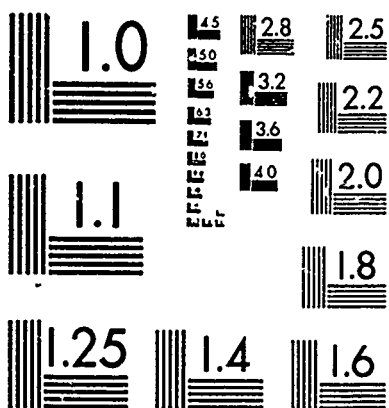
¹ FCC 1973 Financial Data; 1974 data not available

Singling out, in effect, the broadcast industry to shoulder the burden of these additional performance fees is unwarranted. It is an economic reality that a good deal of the monies received by record companies and performers through record sales are directly attributable to the broadcasting of records. For years, record companies have supplied records to broadcasters without charge in recognition of the incalculable promotional value of having their records played on the air. S. 1111 would compel broadcasters to pay record companies for the "privilege" of increasing such companies' profits from record sales. This neither makes sense economically nor comports with the Constitutional purpose of copyright.

NBC believes that the compensation of performers should be left to private negotiation. If the Congress truly believes that the public interest is served by increasing the compensation of undiscovered or lesser-known talent, it should not impose that burden on the broadcasting industry. We believe this area is better left to free negotiation between the representatives of the performers and the record companies who are, properly, the parties at issue on the question of compensation of performers.

We thank this Subcommittee for the opportunity to state our views on S. 1111.





MICROCOPY RESOLUTION TEST CHART
NATIONAL BUREAU OF STANDARDS-1963-A

